Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1023

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI and ROBERT L. BRADDOCK, VIRGINIA A. GRIFFIN, HENRY C. KASSON, CHARLES D. LINDBERG, and MARY T. SCHLOSS, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI and DONALD R. WALDRIP, INDIVIDUALLY AND AS SUPERINTENDENDENT OF THE CINCINNATI PUBLIC SCHOOLS,

Petitioners,

v.

MONA BRONSON by her parent and next friend CHARLES BRONSON, TONY FLETCHER by parent and next friend MRS. PARILEE FLETCHER, GLENN ALEXANDER by parent and next friend MRS. HARVENA ALEXANDER, NINA SHAPIRO by parents and next friend MR. & MRS. JUDITH & HERBERT SHAPIRO, CHAUNSTON BROWN by parent and next friend MRS. LUEKIUCIUS BROWN, MARK GERARD SILLETT by parent and next friend MRS. ANASTASIA SILLETT, PARRISH LATTIMORE by parents and next friend MR. & MRS. DONALD LATTIMORE, JR., ROBIN FRYE by parent and next friend BETTY J. FRYE, VALERIE MILLER by parents and next friend MR. & MRS. CHARLES MILLER, ANDRE HARRIS by parent and next friend MRS. JANET HARRIS, DAVID FRIEL by parents and next friend MR. & MRS. KENT FRIEL, MICHAEL SEXTON by parent and next friend STEPHEN R. SEXTON; and on behalf of all persons similarly situated; ROBERT S BROWN and RONALD J. TEMPLE, Individually and as members of the BOARD OF EDUCATION of the City School District of the City of Cincinnati,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OCTOBER TERM, 1975

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Petitioners,

v.

MONA BRONSON by her parent and next friend CHARLES BRONSON, TONY FLETCHER by parent and next friend MRS. PARILEE FLETCHER, GLENN ALEXANDER by parent and next friend MRS. HARVENA ALEXANDER, NINA SHAPIRO by parents and next friend MR. & MRS. JUDITH & HERBERT SHAPIRO, CHAUNSTON BROWN by parent and next friend MRS. LUEKIUCIUS BROWN, MARK GERARD SILLETT by parent and next friend MRS. ANASTASIA SILLETT, PARRISH LATTIMORE by parents and next friend MR. & MRS. DONALD LATTIMORE, JR., ROBIN FRYE by parent and next friend BETTY J. FRYE, VALERIE MILLER by parents and next friend MR. & MRS. CHARLES MILLER, ANDRE HARRIS by parent and next friend MRS. JANET HARRIS, DAVID FRIEL by parents and next friend MR. & MRS. KENT FRIEL, MICHAEL SEXTON by parent and next friend STEPHEN R. SEXTON; and on behalf of all persons similarly situated; ROBERT S BROWN and RONALD J. TEMPLE, Individually and as members of the BOARD OF EDUCATION of the City School District of the City of Cincinnati,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered September 24, 1975 which affirmed as modified and interpreted an opinion and order of the United States District Court for the Southern District of Ohio, Western Division, entered January 30, 1975.

OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. The opinion of the district court is unreported. Both opinions are reproduced in the Appendix at pages 1a and 36a, respectively.[1]

JURISDICTION

The opinion of the court of appeals was entered September 24, 1975. A Petition for Rehearing filed by petitioners was denied October 30, 1975. Jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTION PRESENTED

Was the district court correct in holding that the principles of collateral estoppel pronounced by this Court and the several circuit courts of appeal have the same force and effect in school desegregation actions asserting Fourteenth Amendment rights which such principles have generally *or* was the court of appeals correct in holding that a judgment in favor of the board of education in a desegregation case does not have the same binding effect which judgments in other types of cases are given?

STATEMENT OF THE CASE

Petitioners ask this Court to exercise certiorari jurisdiction to pass upon the correctness of the judgment of the Court of Appeals for the Sixth Circuit which affirms "as modified and interpreted" an order of the United States District Court for the Southern District of Ohio. The district court held that petitioners have properly asserted that respondents are bound by the judgment and findings made by the district court in *Deal, et al.* v. *Cincinnati Board of*

[1] The opinion of the court of appeals which granted permission to appeal from an interlocutory order is reported in 512 F.2d 718 (6th Cir. 1975) (App. 34a).

Education, et al., 244 F. Supp. 572 (S.D. Ohio 1965), *aff'd* 369 F.2d 55 (6th Cir. 1966), *cert. den.*, 389 U.S. 847 (1967), *aff'd on other issues*, 419 F.2d 1387 (6th Cir. 1969), *cert. den.*, 402 U.S. 962 (1971). It is the court of appeals' modification and interpretation of the district court's opinion and order, by a two to one decision,[2] that petitioners ask this Court to review.

This is the second desegregation suit against the Cincinnati Board of Education within a span of eleven years. It was preceded by a virtually identical action filed in 1963 on behalf of the same class of plaintiffs in which essentially the same allegations were made and the same relief was demanded. That suit resulted in a judgment in favor of the Cincinnati Board of Education. (244 F. Supp. 572) The court of appeals affirmed that judgment, but remanded the case "for further findings on the issues of claimed discrimination in specific schools and programs and claimed harm to Negro students, allegedly caused by racially imbalanced schools, and for the taking of such additional relevant evidence as either party may offer." (369 F. 2d at 65) On remand, the district court found "that neither gerrymandering nor any other alleged discriminatory practice on the part of the Board brought about such racial imbalance as existed. . . ." (419 F.2d at 1398) That general finding was supported by eighteen detailed findings in favor of the Board on specific issues of claimed constitutional violations. (419 F.2d at 1398-1401) All of the findings on remand were affirmed by the court of appeals. (419 F.2d 1387)

Based on the findings made in the *Deal* case, petitioners asserted in this case, as a partial defense, that the plaintiff class, being the same as the class in *Deal*, was bound by the *Deal* findings, and could not endeavor to undermine or

[2] The dissenting judge would have affirmed the district court without any modification. (App. 15a).

impeach those findings in the course of this litigation. The district court agreed with petitioners, and ruled that respondents "will be prohibited from relitigating [the] factual determinations" made in *Deal* as of July 26, 1965. (App. 55a) [a]

The district court stated in its order that the collateral estoppel issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal [pursuant to 28 USC § 1292(b)] from the order may materially advance the ultimate termination of the litigation." (App. 58a) Accordingly, respondents petitioned for permission to appeal from the district court's order. The court of appeals agreed that the collateral estoppel issue presented a controlling question of law, and granted permission to appeal. (512 F.2d 718) (App. 34a)

The district court's opinion carefully defines the application of the collateral estoppel defense to this case:

> It remains only to define the consequences of the collateral estoppel defense as it applies to the case at hand. Basically, our decision that collateral estoppel is applicable herein means that the parties must accept Judge Peck's findings of fact, and that the parties will be prohibited from relitigating those factual determinations. We refer not only to the general finding rendered in *Deal* I (that racial imbalance in the Cincinnati Public Schools was not intentionally caused by the Board of Education), but also to the specific subsidiary findings of *Deal* II which we believe were actually litigated and necessarily determined in order to resolve the question of "whether discrimination existed with respect to specific schools and programs" (369 F. 2d at 65), and in order to resolve the larger overriding question of whether black pupils in the Cincinnati Public Schools were being denied equal protection of the law in contravention of the Fourteenth Amendment. (App. 55a)

[a] In order that the importance of the issue presented by this petition be properly assessed, we have reproduced in the Appendix in their entirety the specific findings made by the district court in the *Deal* case. (App. 61a) The findings appear as an appendix to the court of appeals' second affirmance of the district court. (419 F.2d at 1398-1401)

This statement is consistent with the principles of collateral estoppel which have emanated from this Court and the several circuit courts of appeal.

Although the court of appeals "affirmed" the district court, its affirmance was "as modified and interpreted." (App. 12a) The court of appeals' modification of the district court's order is as follows:

> If new evidence of pre-*Deal* occurrences or conditions is offered the district court will determine in each instance whether or not such evidence is relevant to the inquiry in the present case, i.e., does it shed light on the claim that minority pupils and their parents have been denied equal protection of the law by the defendants during the post-July 26, 1965 period involved in this action? As we have noted previously, in discussing developments and refinements since *Deal*, the district court referred to "the cumulative evidence of a possible constitutional violation." Ultimate decision of the present case will necessarily require consideration of cumulative evidence. Adherence to the doctrine of issue preclusion in no way forecloses the consideration of such evidence. (App. 12a)

The opinion of the Chief Judge Phillips, which is designated as concurring, suggests a further modification of the district court's opinion:

> To the extent that newly discovered evidence of pre-1965 occurrences is relevant in assessing the constitutionality of defendants' conduct after July 26, 1965, it may be admitted for that purpose. A more difficult question would be presented if the new evidence suggested that the findings in *Deal* were incorrect.

School children born or starting to school after the decision in *Deal* II are entitled to have introduced on their behalf in the present case relevant evidence as to matters occurring prior to July 26, 1965, regardless of whether that evidence contradicts the *Deal* findings. If new evidence of pre-1965 events, substantially undercutting the *Deal* findings, is introduced on behalf of school children born or starting to school after the decision in *Deal* II, the District Court may receive it and should consider whether some or all of those findings continue to be viable.

Thus it is apparent that collateral estoppel has only a limited effect in this case. Plaintiffs have wide latitude in marshalling evidence in support of their claim for relief. They are precluded only from relying on the evidence presented in *Deal* to support findings different from or inconsistent with those actually made in that case. (App. 14a)

Fairly considered, the court of appeals' modification of the district court's order represents a novel and special qualification of the doctrine of collateral estoppel for school desegregation cases. If such qualification should gain the force of general precedent, boards of education could be kept in perpetual litigation.

REASONS FOR GRANTING THE WRIT

As far as we know, this is the first school desegregation case to reach this Court in which the NAACP is renewing old claims previously litigated against the same board of education. The district court which will hear this case, and the district courts which will hear other desegregation cases in which the defense of collateral estoppel will be raised, need to know whether to apply the rules of collateral estoppel as this Court has defined them or to apply those rules as the Sixth Circuit has rewritten them for school desegregation cases.

We believe that the Sixth Circuit's unsupportable modification of the district court's ruling was occasioned by the tacit and erroneous assumption that there is something about Fourteenth Amendment rights asserted in school desegregation cases which must cause courts to turn away from the imperatives of the doctrine of collateral estoppel.[4] If permitted to stand uncorrected, such judicial policy could have widespread and disastrous consequences. We urge this Court to grant certiorari in order to prevent such consequences.

The appeal in this case was taken for the purpose of resolving "a controlling question of law" necessary for the expeditious termination of this school desegregation case. Yet a careful reading of the opinions of the three judges who comprised the panel demonstrates that each of them resolved that question in a different way. All of them agree that petitioners may assert the defense of collateral estoppel based on the *Deal* findings. Judge Lively's opinion, which is designated the opinion of the court, modifies the application of that doctrine as it applies to this case by allowing proof of pre-*Deal* facts for the purpose of "[shedding] light on the claim that minority pupils and their parents have been denied equal protection of the law by [petitioners] during the post-July 26, 1965 period. . . ." (App. 12) Chief Judge Phillips, in an opinion denominated

[4] As traditionally applied, the doctrine of *res judicata* operates to bar the entire claim while the companion doctrine of collateral estoppel operates to bar the relitigation of specific fact issues that have been adjudicated in a prior proceeding. The term "*res judicata*," however, is often used in its generic sense to encompass both doctrines. See Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 Mich. L. Rev. 1723 (1968). We wish to emphasize that petitioners claim only that respondents are collaterally estopped from relitigating the findings in the *Deal* case or presenting evidence of pre-*Deal* facts to support their present claims. In other words, any claims of post-*Deal* violations should be limited to those which would be supported by post-*Deal* facts.

as concurring, states without citation of authority that the district court may receive evidence of pre-*Deal* facts even if such evidence impeaches the *Deal* findings. (App. 14a) Judge Weick, who dissented, would affirm the district court and require that respondents prove their claims on the basis of post-*Deal* facts. (App. 15a) It is apparent, therefore, that the interlocutory appeal failed to achieve its intended purpose. Unless this Court grants certiorari and resolves the issue definitively, the district court must attempt to reconcile the three opinions of the court of appeals to determine precisely in what way its opinion was modified and by whom.

We submit that, but for the fact that this is a school desegregation case, the court of appeals would have had no difficulty applying a judicial doctrine as deeply rooted in American jurisprudence as is that of collateral estoppel. That the court of appeals had great difficulty with this question is plainly apparent from its call for supplemental briefs after the oral argument on the question:

> Should the doctrine of res judicata be held inapplicable in this school desegregation case on grounds of overriding public policy? (App. 74a)

But school desegregation cases should be subject to the doctrines of *res judicata* and collateral estoppel to the same extent as cases involving other areas of substantive law. This Court has repeatedly emphasized that these doctrines are preeminent. *E.g., Blonder-Tongue Labs.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971); *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955); *Heiser* v. *Woodruff*, 327 U.S. 726 (1946); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931); *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25 (1917). Indeed, we can perceive of

no more explicit instructions on the importance of these doctrines than those imparted in Chief Justice Stone's opinion in *Heiser* v. *Woodruff*:

> But we are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata, *which is founded upon the generally recognized public policy that there must be some end to litigation* and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court. *Baldwin* v. *Iowa State Traveling Men's Asso.*, 283 U.S. 522, 525, 526, 75 L ed 1244, 1246, 1247, 51 S Ct 517.
>
> . . .
>
> In general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit. (327 U.S. at 733-35) (Emphasis added)

We submit that the public policy of terminating litigation has unique application to desegregation actions, which have demonstrably disruptive effects upon communities.

Justice Stewart's statement in *Ashe* v. *Swenson* is as emphatic as the expression quoted above:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States* v. *Oppenheimer*, 242 U.S. 85, 61 L Ed 161, 37 S Ct 68, . . . (397 U.S. at 443)

While *Ashe* is a criminal case, it demonstrates that the doctrine of collateral estoppel has an important constitutional dimension. That case involved successive state criminal prosecutions of the defendant for robbery of a poker game. The first trial resulted in an acquittal of the charge of robbing one of the poker players. The defendant was then brought to trial on a second charge for robbing one of the other players. After the court overruled a motion to dismiss on the ground of double jeopardy, the defendant was tried and convicted. On certiorari, this Court held that the second trial was barred by the doctrine of collateral estoppel which, it was further held, is embodied in the Fifth Amendment:

> The ultimate question to be determined . . . is whether [the doctrine of collateral estoppel] is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. (397 U.S. at 445)

In view of the holding in *Ashe*, we suggest that in civil cases the doctrine of collateral estoppel has its roots in Fifth Amendment Due Process.[5] If this is so, petitioners' entitlement to the full benefits of the *Deal* findings rises to the dignity of a constitutional right.

Whether, as *Ashe* implies, the right to rely upon the collateral effect of a prior judgment is entitled to constitutional protection, there is no doubt that it is entitled to the full protection of judicial policy. In the *Blonder-Tongue Labs.* case Mr. Justice White expressed the overriding

[5] *Cf. Western Union Telegraph Co.* v. *Commonwealth of Pennsylvania*, 368 U.S. 71 (1961), in which the Court held that an escheat judgment violated due process because the Pennsylvania courts had no power to protect the defendant against claims of other states that the funds were subject to recovery under their escheat statutes. See generally Vestal, *The Constitution and Preclusion/Res Judicata*, 62 Mich. L. Rev. 33, 47 (1963); Steakley and Howell, *Ruminations on Res Judicata*, 28 Sw. L. J. 355 (1974); Black, *A Treatise on the Law of Judgments*, Vol. II, § 500 (2nd Ed. 1902).

consideration behind that policy when he referred to the need to avoid a "misallocation of resources" and the diversion of defendant's time and money "to relitigation of a decided issue." (402 U.S. at 329) The holding of *Blonder-Tongue Labs.* is that unless a party against whom estoppel is asserted can demonstrate "that he did not have 'a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time,'" the defense of collateral estoppel must be upheld. (402 U.S. at 333)

The ultimate issue of fact in the *Deal* case, as in the present case, was whether the evidence shows a segregative intent on the part of the Cincinnati Board of Education. No serious argument can be made that the plaintiffs in the *Deal* case did not fully and fairly litigate, "procedurally, substantively and evidentially" that factual issue as of July 26, 1965. As the court of appeals stated in its second affirmance:

> [Plaintiffs'] representatives spent about two and one-half years pouring over the books and records of the Cincinnati School System in an effort to find something that was wrong. . . . In lengthy briefs appellants complain about almost everything in the operation of the Cincinnati School System. (419 F.2d at 1394-95)

Moreover, the court of appeals' recognition that the class in this case was fully and adequately represented in *Deal* (App. 9-10a) highlights the error in Chief Judge Phillips' observation that children new to the school system since *Deal* have the right to offer evidence to undercut the findings of *Deal*. (App. 14a) It is established beyond dispute that if the class is the same as that in the prior case and if the class was fairly represented in that prior case, all members of the class, then existing and subsequent, are bound by the judgment in that case. *E.g.*, *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Supreme Tribe of Ben Hur* v.

Cauble, 255 U.S. 356 (1921); *Smith* v. *Swormstedt*, 16 How. (U.S.) 288 (1853); *System Federation No. 91, Ry. Employes' Dept., A.F.L.* v. *Reed*, 180 F.2d 991 (6th Cir. 1950) Indeed, if that were not the law, every new elector could relitigate reapportionment cases and every new taxpayer could relitigate taxpayers actions. The system, itself, could not stand the strain of such perpetually unsettled conditions.

Bearing in mind that this is an interlocutory appeal under Title 28 USC § 1292(b), we urge the Court to grant certiorari for the same reason as in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970): "[to review] this basic issue . . . at this stage of the litigation [and not postpone such review] until after a trial under the Court of Appeals' decision." (396 U.S. at 381) See also *Tcherepnin* v. *Knight*, 389 U.S. 332, 334 (1967). Indeed, the statement by Mr. Justice Stewart in *Tidewater Oil Co.* v. *United States*, 409 U.S. 151 (1972) expresses the compelling reason why certiorari should be granted here:

> Whenever a court of appeals decides a controlling question of law in any litigation, its views are subject to review here. Far from being anomalous, interlocutory review of potentially dispositive questions by the courts of appeals in Government antitrust cases would be helpful to this Court, giving us the benefit of intermediate appellate consideration in these cases. We could then exercise our certiorari power informed by the reasoning of an appellate court, and there might be no later direct appeal at all from the final judgment. And surely interlocutory appeals under § 1292 (b) in Government antitrust cases would serve to lighten the burden on trial courts and litigants alike. (409 U.S. at 186-7)

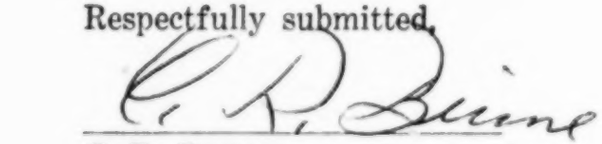
It is significant that, in commencing this appeal, respondents maintained that the collateral estoppel effect of

the *Deal* findings presents a controlling question of law. If this question is reviewed now, and this Court rules, as we believe it must, that the court of appeals' modification of the district court's opinion was erroneous, then an enormous potential waste of litigation time and money will be obviated, not only for the parties and the district court in this case, but for the parties to other school desegregation cases, and for the judges who must decide them.

CONCLUSION

This classic interlocutory appeal presents a controlling novel question of enormous public interest. It is uniquely within the reach of this Court's certiorari jurisdiction. We respectfully urge that the writ for which these petitioners pray be issued.

Respectfully submitted,



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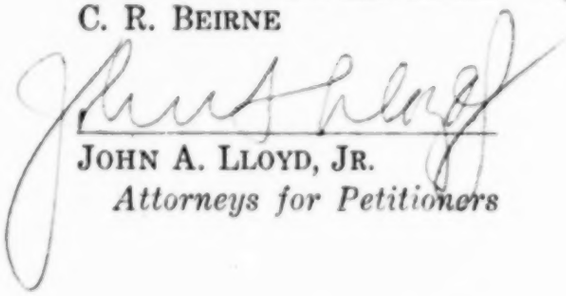

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APPENDIX A

No. 75-1244

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONA BRONSON, CHARLES BRONSON, TONY FLETCHER, GLENN ALEXANDER, HAVENA ALEXANDER, NINA SHAPIRO, JUDITH & HERBERT SHAPIRO, CHAUNSTON BROWN, LEUKUCIUS BROWN, MARK GERRARD SILLETT, ANASTASIA SILLETT, PARRISH LATTIMORE, MRS. DONALD LATTIMORE, JR., ROBIN FRYE, BETTY J. FRYE, VALERIE MILLER, MR. & MRS. CHARLES MILLER, ANDRE HARRIS, JANET HARRIS, MICHAEL SEXTON, and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF CINCINNATI, ITS MEMBERS, JOHN J. GILLIGAN, GOVERNOR OF OHIO AND OHIO STATE BOARD OF EDUCATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Ohio

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Decided and Filed September 24, 1975.

Before: PHILLIPS, Chief Judge; WEICK and LIVELY, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court. PHILLIPS, Chief Judge, (P. 12), delivered a separate concurring opinion. WEICK, Circuit Judge, (P. 14), delivered a dissenting opinion.

LIVELY, Circuit Judge. The court granted this interlocutory appeal by an order appearing at 512 F.2d 719 to consider the important question of the applicability of the doctrine of res judicata to this school desegregation litigation. In *Deal* v. *Cincinnati Board of Education (Deal I)*, 244 F. Supp. 572, 582 (S.D. Ohio 1965), the district court denied relief upon a finding that the "plaintiffs have failed to establish a deprivation of rights under the law or under the Constitution of the United States. . . ." It had been stipulated that the Cincinnati school system included a number of schools attended almost entirely by Negro pupils, a number attended entirely by white pupils and a number attended by both Negro and white pupils in various percentages. The district court found the Cincinnati school system had been operated on the "neighborhood plan" and that "the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve." *Id.* at 580.

Deal I was affirmed on appeal to this court, 369 F.2d 55 (1966), and certiorari was denied by the Supreme Court, 389 U.S. 847 (1967). We held that where the sole limitation imposed by state action on the choice of schools by pupils results from adherence to the neighborhood school concept this limitation does not share "the arbitrary, invidious characteristics of a racially restrictive system." 369 F.2d at 60. This court declared that the critical fact determination in an action charging a school board with violation of the rights of minority pupils is whether an existing racial imbalance is intentionally caused by discriminatory practices of the board. A statistical imbalance standing alone is not enough; official discrimination is

required to invoke the protection of the Fourteenth Amendment. On this basis we upheld the exclusion by the district court of evidence of alleged discrimination in the public and private housing markets of Cincinnati—acts over which the school board had no control.

Though the judgment of the district court in *Deal I* was affirmed on the finding that the racial imbalance which existed in the Cincinnati school system as a whole was not intentionally caused by the Board, the case was remanded for further findings with respect to claimed discrimination in specific schools and programs, and alleged harmful effects of the racial imbalance that did exist. New findings were made by the district court following remand, and the case was brought to this court once again. In affirming *Deal II*, *Deal* v. *Board of Education*, 419 F.2d 1387 (1969), *cert. denied*, 402 U.S. 962 (1971), we upheld the findings that there was a high correlation between the distribution of Negro pupils throughout the school system and the general neighborhood residential patterns of the City; that there were topographical and man-made barriers which required irregular boundary lines for various attendance districts; and, specifically, that there was no evidence of racial discrimination by the Cincinnati Board in locating schools, assigning teachers and staff or in failing to furnish equal faciilties to different schools.

The "subsidiary findings" with respect to particular schools and programs were also upheld. The district court and this court disagreed with the contentions of the plaintiffs-appellants in *Deal II* that the law had been changed since *Deal I* by the Supreme Court decisions in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968); *Raney* v. *Board of Education of the Gould School District*, 391 U.S. 443 (1968); and *Monroe* v. *Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968). These three cases were viewed as holding that

a court may require a school board to discard as inadequate a plan based on "freedom of choice" or "free transfer" which has not effectively desegregated a dual school system, and thus as applying only to districts formerly having *de jure* segregation. 419 F.2d as 1396.

The Deal case was brought as a class action on behalf of ninety-six named "minor citizens of the State of Ohio" and on behalf of "thousands of [other] Negro minors within the school district of Cincinnati, who are similarly situated because of race and color." The present case was instituted as a class action by "parents or minor children thereof, attending schools in the public school system of the State of Ohio and in the City of Cincinnati." The action was brought by each plaintiff on behalf of himself and his minor children "and on behalf of all persons in the State of Ohio similarly situated." The complaint charges the defendants with engaging in numerous discriminatory acts, practices, policies and customs and seeks declaratory and injunctive relief. Each of the defendants in this action pled, inter alia, that the doctrine of res judicata bars relitigation in this case of the issues adjudicated in *Deal I* and *II*. In a "Motion to Determine the Affirmative Defense" the plaintiffs requested the district court "to resolve the issue raised by the affirmative defense of *res judicata*" which had been pled by the defendants.

The district court filed an opinion in response to this motion holding that "defendants may properly assert the affirmative defense of *res judicata* in the present case, or, more precisely, that they may assert here the collateral estoppel aspect of that general doctrine." The accompanying order contained a certification under 28 U.S.C. § 1292(b) for immediate appeal, which this court granted.

The district court considered the question of whether intervening changes had occurred in the law applicable to school desegregation litigation since *Deal I* and *II* which

would make it inappropriate to permit the defendants to rely on res judicata or collateral estoppel. The court concluded that the basic holdings of *Deal I* and *II* have not been reversed or overruled. It was noted that instances where school boards had been charged with the affirmative duty to weed out all vestiges of segregation "root and branch" involved *remedy* proceedings where previous actions or proceedings had established constitutional violations. The district court held that the Supreme Court decisions impose no such affirmative duty in the absence of a finding that a board has operated a dual school system or that *de jure* segregation had been practiced.

While finding that changes in the law since *Deal I* and *II* have not been so drastic as to permit a relitigation of the issues decided in those cases, the district court did note "developments and refinements" in the law since *Deal*. One such development or refinement was stated by the district court as follows:

> And, even where there has been no showing of duality or prior deliberate discrimination, a school board should certainly consider reasonable ways to alleviate racial imbalance and a failure to act in this regard could be part of the cumulative evidence of a possible constitutional violation in certain circumstances.

In its opinion the district court held that the question of segregative intent was critical to the decisions in *Deal I* and *II* and that this issue was settled by a finding that the Cincinnati Board had no such intent up to July 26, 1965, when the *Deal* inquiry ended. Thus, the court held that the inquiry in the present case is limited to the existence of segregative intent in the period since July 26, 1965. The court found that the class of plaintiffs in the present case is substantially the same as in *Deal*. Noting that an application of strict res judicata principles would bar any fur-

ther litigation between the parties, the court concluded that the less comprehensive doctrine of collateral estoppel should properly be applied and held that the parties to the present action are foreclosed from "the relitigation of essential facts or issues which were previously litigated by the parties (or their privies) and judicially determined."

The district court was clearly correct in finding that *Deal I* and *II* continue to have "vitality." *See Higgins* v. *Grand Rapids Board of Education*, 508 F.2d 779 (6th Cir. 1974). In fact, the plaintiffs in the present case agree in their brief that the "holding [of *Deal*] that racial imbalance alone does not justify a school desegregation order by a Federal District Court . . . remains good law. . . ." (Supp. Brief for Appellants at 21.) However, they maintain that certain aspects of *Deal* have been "overtaken" by more recent decisions of the Supreme Court and this court. Plaintiffs maintain that to the extent the *Deal* finding of no segregative intent was based on a "dominant purpose" test rather than one which looked to the natural and probable effects of the Board's actions and inactions the finding is no longer valid. In this respect plaintiffs rely, inter alia, on this court's opinions in *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178 (1974), *cert. denied* 43 U.S.L.W. 3599 (1975); *Berry* v. *Benton Harbor School District*, 505 F.2d 238 (1975); *Brinkman* v. *Dayton Board of Education*, 503 F.2d 684 (1974); *Bradley* v. *Milliken*, 484 F.2d 215 (en banc 1973), *rev'd on other grounds sub nom. Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Davis* v. *School District of Pontiac*, 443 F.2d 573, *cert. denied*, 404 U.S. 913 (1971); and Supreme Court decisions, particularly *Swann* v. *Charlotte-Mecklenburg Board of Eduation*, 402 U.S. 1 (1971); and *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973). These intervening decisions are said to have changed the law sufficiently to render collateral estoppel inapplicable to the present case. The plaintiffs argue

further that school cases are sui generis and involve national public policy of the highest priority which requires that res judicata and collateral estoppel at least be limited in their application.

In *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972), the Supreme Court described as fruitless and irrelevant any inquiry into the "dominant" motivation of school authorities where the schools had previously been subject to state-enforced racial segregation. Instead, the Court said, it had "focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a *permissible method of dismantling a dual system.*" *Id.* at 462 (emphasis added). On the other hand, in *Keyes* v. *School District*, *supra*, which involved a school system like Cincinnati's where there had never been state-mandated segregation, the plaintiffs were required to prove "not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." 413 U.S. at 198. In *Keyes*, the Court emphasized that the "differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." 413 U.S. at 208 (emphasis in original). Thus, contrary to plaintiff's claim, the Supreme Court appears to have held that intent is synonymous with purpose in determining whether a racial imbalance which is found to exist in a school system that was never segregated by state law results in a constitutional violation. In a school system which was previously segregated by state law there is no requirement that intent be shown. The state action requirement of the Fourteenth Amendment is not an issue. On the other hand, in a school system which has never been operated under a state requirement of separation of the races, *de facto* segregation may only be treated as resulting from state action in violation of the Fourteenth Amendment if it is shown to result from inten-

tional acts, omissions or policies of public officials or public bodies. Thus the *de jure/de facto* distinction has been retained (see concurring and dissenting opinion of Mr. Justice Powell in *Keyes*, 413 U.S. at 217), and the Supreme Court continues to apply different standards to the determination of two different questions: (1) Are the methods adopted by a board effective to dismantle a dual system? and (2) Does a racial imbalance in a unitary system exist because of actions and policies of public officials, primarily the school board, which reflect and carry out a purpose or intent to segregate? In this case we are concerned only with the second question.

The district court expressed some difficulty in reconciling the decisions of this court since *Deal*. However, Judge Porter concluded that references to the "effect test" in our opinions relate to the fact that a court may infer intent, which is a subjective fact not easily proven, from evidence of racial imbalance accompanied by acts or omissions of a school board, the natural and probable result of which is to produce or perpetuate a segregated school system. *See, e.g., Berry* v. *Benton Harbor School District, supra*; *Oliver* v. *Michigan State Board of Education, supra*. This is a correct reading of our decisions. In these cases and in *Bradley* v. *Milliken, supra*, the court did not dispense with the requirement that segregative intent or purpose be proven, but rather held that this element of the cases had been proven by showing acts and policies of the school authorities which had the natural and foreseeable effect of producing segregated schools, a showing from which the required intent could be inferred. In *Higgins*, which was decided in the light of the Supreme Court's treatment of the requirement of intent in *Keyes*, we noted that it is permissible for a court to infer intent from proven circumstances. 508 F.2d at 793.

We conclude that there has been no such change in the law since *Deal* as to prevent altogether the application of the doctrine of collateral estoppel to this case. Though there is a strong public policy against the continuance of racial segregation in public schools we do not believe that school desegregation cases are so different from other types of litigation that principles of res judicata and collateral estoppel should never be applied to them. The public policy consideration that there be an end to all litigation which underlies the doctrines of res judicata and collateral estoppel is itself firmly established. This court has held, however, that "[n]either collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." *Tipler* v. *E. I. duPont deNemours and Co.*, 443 F.2d 125, 128 (1971).

This appeal requires that we determine the extent to which the doctrine of res judicata should be applied in order to accommodate two competing public policies and avoid manifest injustice. We believe that the district court properly limited the application of the doctrine to this case by holding that the principles of collateral estoppel, as opposed to res judicata, will be observed. *Deal* was filed as a "spurious class action" under Rule 23 of the Federal Rules of Civil Procedure prior to the 1966 amendment thereof. According to the authorities, an adverse judgment in such an action was not binding on persons who were not parties to the class action. See 3B J. Moore, Federal Practice ¶ 23.10-1, at 23-2769; ¶ 23.11[3], at 23-2851. On the other hand a public body should not be required to defend repeatedly against the *same* charge of improper conduct if it has been vindicated in an action brought by a person or group who validly and fairly represent those whose rights are alleged to have been infringed. Though the plaintiffs in the instant action are not the same persons

as those who instituted *Deal*, that action was brought to vindicate the rights of all minority school children and parents affected by the actions and policies of the Cincinnati Board. There is a strong community of interests between the *Deal* plaintiffs and the *Bronson* plaintiffs and both actions sought relief on behalf of the same large group of black citizens. For the purposes of collateral estoppel we do not consider the plaintiffs in the present action to be "strangers" to the *Deal* litigation. The proper balance between the public policy of requiring a finality to judgments which settle issues in litigation and that of preventing the denial of equal protection of the law to a generation which comes after such a judgment has been rendered may be achieved by applying the rule of "issue preclusion." See *Humphreys* v. *Tann*, 487 F.2d 666 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974); *Davis* v. *McKinnon & Mooney*, 266 F.2d 870 (6th Cir. 1959); *Bernhard* v. *Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942).

The district court's order forecloses the plaintiffs from showing that the defendants did, prior to July 26, 1965, act with a segregative intent or that the actions, inactions or policies of the Board prior to that date violated the constitutional rights of minority pupils or their parents. These issues have been decided and under the issue preclusion application of collateral estoppel may not be reopened. Nevertheless, there are children attending the Cincinnati schools now who either were not born in 1965 or had not started to school. Their claims were not in existence at the time of the judgment in *Deal* and could not have been extinguished by it. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 328 (1955). The complaint of such children and their parents of alleged continuing wrongful acts subsequent to 1965 declares a different cause of action than that concluded by *Deal*, one to which estoppel does not apply. *Cream Top Creamery* v. *Dean Milk Co.*, 383 F.2d

358, 363 (1967); *United States* v. *General Electric Co.*, 358 F. Supp. 731, 740 (S.D.N.Y. 1973).

In order to establish their claim of a present denial of constitutional rights these plaintiffs must be permitted to show whether the post-1965 actions, inactions and policies of the defendants have caused or contributed to the conditions of which they complain. However, this evidence cannot be considered in a vacuum any more than the actions and decisions of the defendants have taken place in a vacuum. In oral argument before this court counsel for the defendant Cincinnati Board stated that the plaintiffs may introduce evidence of conditions prior to July 26, 1965 "for background purposes," but that application of res judicata principles prevents the finding of violation prior to that date. We agree. To the extent that the pre-1965 actions and policies of the Board and the conditions which existed on July 26, 1965 are relevant to a determination of the existence or non-existence of unlawful segregation at the times involved in this case, the district court may take judicial notice of facts stipulated or proven in *Deal*.

In the per curiam opinion granting an appeal from the interlocutory order of the district court we stated:

> The effect of this ruling appears to be that plaintiffs would be collaterally estopped from relitigating any of the issues determined in the prior litigation between the plaintiffs in the earlier class action and the defendant board *and from introducing evidence as to events occurring prior to July 26, 1965*. 512 F.2d at 719 (emphasis added).

We would be unable to affirm the order of the district court if this were its effect. However, upon restudy of the order and memorandum opinion we conclude that it does not preclude the introduction of evidence concerning events which occurred prior to July 26, 1965.

At this stage of the proceedings, when there has been no opportunity to offer evidence, the district court has very properly made no attempt to catalogue or describe the evidence which will be admitted. If new evidence of pre-*Deal* occurrences or conditions is offered the district court will determine in each instance whether or not such evidence is relevant [1] to the inquiry in the present case, *i.e.*, does it shed light on the claim that minority pupils and their parents have been denied equal protection of the law by the defendants during the post-July 26, 1965 period involved in this action? As we have noted previously, in discussing developments and refinements since *Deal*, the district court referred to "the cumulative evidence of a possible constitutional violation." Ultimate decision of the present case will necessarily require consideration of cumulative evidence. Adherence to the doctrine of issue preclusion in no way forecloses the consideration of such evidence.

The order of the district court as modified and interpreted herein is affirmed. Each party will bear its own costs on this appeal.

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[1] Rule 401, Federal Rules of Evidence (1975), contains a definition of "Relevant Evidence" and the Advisory Committee's Notes to Rule 401 deal with the definition.

PHILLIPS, Chief Judge (concurring). I concur in the opinion prepared by Judge Lively affirming the decision of the District Court, as interpreted and modified by this court. I add these observations only to emphasize what I understand to be the practical effects of our decision.

Nothing in the doctrine of collateral estoppel prevents plaintiffs from introducing evidence of events occurring in the Cincinnati school system after July 26, 1965. Plaintiffs are free to offer this evidence and to argue for any interpretation of the eviednce they consider necessary to vindicate their rights under the Fourteenth Amendment.

The evidence submitted to the District Court in *Deal* stands on a different footing. This evidence was the subject of exhaustive litigation and was considered fully by the District Court. This court ruled in *Deal II* that the findings of fact of the District Court in that case were not clearly erroneous. 419 F.2d 1387, 1395 (6th Cir. 1969). The Supreme Court denied certiorari. 402 U.S. 962 (1971). Accordingly, the findings of fact based upon this evidence are binding upon all the parties to the present case as of the effective date of *Deal II*. Plaintiffs may not now urge upon the court findings or interpretations of that evidence different from those made by the District Court in *Deal*.

This is not to say, however, that the findings made in *Deal* and the underlying evidence must be ignored in the present litigation. To the contrary, so long as the *Deal* findings are not directly or indirectly contradicted, the court in the case at hand is free to rely upon the evidentiary fruits of the earlier case in determining whether the present status of the Cincinnati school system is the result of constitutional violations on the part of the defendants.

The plaintiffs in *Deal* spent two and one-half years poring over the books and records of the Cincinnati school system. Vast quantities of documentary and testimonial evidence were presented at trial. It may seem unlikely that plaintiffs

now could discover relevant evidence relating to the pre-1965 period that was not before the District Court when it made findings in *Deal*. Nevertheless, it is possible that such evidence may come to light during the course of the present litigation, and its effect must be considered. To the extent that newly discovered evidence of pre-1965 occurrences is relevant in assessing the constitutionality of defendants' conduct after July 26, 1965, it may be admitted for that purpose. A more difficult question would be presented if the new evidence suggested that the findings in *Deal* were incorrect.

School children born or starting to school after the decision in *Deal II* are entitled to have introduced on their behalf in the present case relevant evidence as to matters occurring prior to July 26, 1965, regardless of whether that evidence contradicts the *Deal* findings. If new evidence of pre-1965 events, substantially undercutting the *Deal* findings, is introduced on behalf of school children born or starting to school after the decision in *Deal II*, the District Court may receive it and should consider whether some or all of those findings continue to be viable.

Thus it is apparent that collateral estoppel has only a limited effect in this case. Plaintiffs have wide latitude in marshalling evidence in support of their claim for relief. They are precluded only from relying on the evidence presented in *Deal* to support findings different from or inconsistent with those actually made in that case.

WEICK, Circuit Judge, dissenting:

The sole issue in this appeal is whether plaintiffs' second class suit to desegregate the public schools in Cincinnati is barred by the doctrines of res adjudicata and collateral estoppel with respect to the issues finally adjudicated in the first suit.

The District Court held these doctrines were applicable and that the plaintiffs were attempting in the second suit to relitigate the very issues decided against them in *Deal* I and *Deal* II which were extensively litigated through all of the federal courts over a period of time from 1963 to 1971.

The complaint in the present case does not even mention the fact that the issues of desegregation were previously litigated. Obviously, the drafters of the complaint wanted to forget it.

Although the majority opinion states that the judgment of the District Court is affirmed, as modified, actually it is reversed as to the only real issue in the case and by a curious unprecedented concept.

This reasoning is that school children who were either not born or were not attending the public schools in Cincinnati at the time of the decision in *Deal* are not bound by it. But the class in *Deal* was all black children and their parents. In the second suit, like the first, the class is black children and their parents.

In the majority opinion it is stated:

> Nevertheless, there are children attending the Cincinnati schools now who either were not born in 1965 or had not started to school. Their claims were not in existence at the time of the judgment in *Deal* and could not have been extinguished by it. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 328 (1955). The complaint of such children and their parents of alleged continuing wrongful acts subse-

quent to 1965 declares a different cause of action than that concluded by *Deal*, one to which estoppel does not apply. *Cream Top Creamery* v. *Dean Milk Co.*, 383 F.2d 358, 363 (1967); *United States* v. *General Electric Co.*, 358 F. Supp. 731, 740 (S.D.N.Y. 1973).

In order to establish their claim of a present denial of constitutional rights these plaintiffs must be permitted to show whether the post 1965 actions, inactions and policies of the defendants have caused or contributed to the conditions of which they complain.

The concurring opinion of Chief Judge Phillips states:

> School children born or starting school after the decision in *Deal II* are entitled to have introduced on their behalf in the present case relevant evidence as to matters occurring prior to July 26, 1965, regardless of whether that evidence contradicts the *Deal* findings. If new evidence of pre-1965 events, substantially undercutting the *Deal* findings, is introduced on behalf of school children born or starting to school after the decision in *Deal II*, the District Court may receive it and should consider whether some or all of those findings continue to be viable.

If the plaintiffs in *Deal* had newly discovered evidence they should have proceeded under Rule 60(b) of the Federal Rules of Civil Procedure to obtain relief from the judgment. The trouble is that the motion for relief must be filed within a reasonable time, but not later than one year. Here more than 10 years have elapsed since Judge Peck's decision and, if we follow the thesis of these two opinions in the present appeal, each year when a new crop of children come into the public schools they could relitigate all of the issues previously decided by the courts and this could happen *ad infinitum* until Gabriel sounds his horn.

It is obvious that the only purpose of the present suit is to overturn the factual findings and judgment of Judge Peck in the *Deal* cases which we affirmed.

The majority opinion states:

> The complaint of such children and their parents of alleged *continuing* wrongful acts subsequent to 1965 declares a different cause of action than that concluded by *Deal*, one to which estoppel does not apply. (Emphasis added).

This is a non sequitur. The findings of fact in *Deal* found no wrongful acts or conduct prior to 1965 so there could be no continuing wrongful acts unless we overturn Judge Peck's findings and hold that the acts which he found legal were wrongful.

These two opinions authorize the reopening and retrial of all of the issues in *Deal*.

The holding of the District Court which the majority reverses is as follows:

> We stated earlier that we would return to the issue of party identity since collateral estoppel traditionally precludes only the relitigation of essential facts or issues which were previously litigated by the parties or their privies. In this regard, we note first that substantial identity is all that is necessary, and that privity is deemed to exist if there is some connection between the present and former parties such that it is fair and reasonable that the present party be bound by the prior determinations. See, 46 Am. Jur. 2d, Judgments §§ 531.32. And we further recognize that these concepts of substantial identity and privity may be extended to class actions. See, e.g., *Hansberry* v. *Lee*, 311 U.S. 32, 41-43 (1940). Applying these concepts to the case at hand, we conclude that the present class of plaintiffs is substantially the same as in *Deal*, and that it would be both fair and reasonable to bind the present plaintiffs by the *Deal* determinations.

It is submitted that this decision by Judge Porter is correct and should be affirmed. The Board can be held account-

able only for any new acts and conduct subsequent to the cut off date of July 16, 1965 and not authorized or approved in *Deal*.

The brief of the Board makes the following statement with respect to the identity of counsel for the plaintiff in *Deal* and in the present case which has not been disputed:

> Thus, it is clear that, to the extent of the issues presented by this appeal, the class of plaintiffs who instituted the *Deal* suit seek to relitigate precisely the same claims that were decided in *Deal*.
>
> Moreover, in *Deal* the plaintiffs were represented by Robert L. Carter, Barbara A. Morris and Lewis M. Steele of the National Office of the NAACP and Norris Muldrow, Cincinnati, for the Local Chapter of the NAACP. 396 F.2d at 57.
>
> In the present case the complaint is signed by Nathaniel Jones, General Counsel NAACP, 1790 Broadway, New York, New York, 10019, in addition to Louis R. Lucas, Memphis, James M. Skiles, "Lawyers Committee for Civil Rights under Law," Washington, D. C., Lester Gaines and Leonard D. Slutz, Cincinnati.

Robert L. Carter was counsel for the appellant Brown before the Supreme Court of the United States in *Brown* v. *The Board of Education*, 347 U.S. 483 (1954). Mr. Carter was also present for the appellant Brown in *Brown II*, 349 U.S. 294 (1955), and participated as lead counsel in many other school segregation cases, representing the NAACP. It is, therefore, apparent that both *Deal* and *Bronson* were brought as class actions and not merely for the named plaintiffs, alleging substantially the same facts and the same claims of violation of constitutional rights and praying for the same relief, and that both cases were filed, prosecuted and controlled by counsel for the NAACP.

The role of the NAACP and its experienced counsel in both *Deal* and in *Bronson* illustrates that the test of adequacy of representation, which is the primary prerequisite to making a class action judgment binding upon absent class members, was abundantly satisfied in *Deal*.

No claim has been made that the class in *Deal* was not fairly and adequately represented by these lawyers who had extensive experience in the field of school desegregation cases. They had been eminently successful in handling litigation involving desegregation of the southern schools. They then embarked on litigation involving the northern schools which presented an entirely different problem since black children are not forbidden by state law from attending white schools.

Deal I and *Deal II* involved protracted northern school litigation and was fought in all of the federal courts over a period of 11 years. Many issues were raised and determined. If counsel for the plaintiffs left any stones unturned, we were not aware of it.

In *Deal* II we stated:

> Appellants' representatives spent about two and one-half years pouring over the books and records of the Cincinnati School System in an effort to find something that was wrong. Appellants offered in evidence 286 joint exhibits, 21 plaintiffs' exhibits, stipulations, answers to interrogatories, and testimony of witnesses. One stipulation agreed upon by the parties contains seventy-one pages. In lengthy briefs appellants complain about almost everything in the operation of the Cincinnati School System.
>
> The amended complaint is in form commonly used in actions for desegregation of dual school systems, where the Board is asked to submit a plan for desegregation. It is totally inappropriate here, where desegregation took place eighty-two years ago. We find no good reason for disrupting the operation of the Cincinnati School System.

Segregation in the public schools in Ohio had been abolished by the legislature on February 22, 1887 long before the Supreme Court abolished it for the South on constitutional grounds in 1954 in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). The legislature of Ohio adopted a neighborhood plan for the location of public schools at such places as would be convenient for attendance of the largest number of children. Ohio Rev. Code § 3315.48. It was not then thought that neighborhood schools were iniquitous or discriminatory.

In essence, in *Deal*, the District Court found, from all the voluminous evidence, that there had been no violation of the constitutional rights of the plaintiffs or of the class which they represent; that there had been no gerrymandering of school zone lines or other acts and conduct of the Board intended or having the effect of segregation or maintaining segregation; that the concentration of black people in Cincinnati resulted from residential patterns or from other causes over which the Board had no control; that schools had been constructed in locations where the largest number of children resided pursuant to the mandate of Ohio Rev. Code § 3315.48. While the Board had taken steps to relieve racial imbalance in the public schools, and is still taking them, it was of the view that it was not required by law to balance the races in each and every school in the system. This view was upheld even in southern schools and was made plain by the opinion written for the court by Chief Justice Burger in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). This salutary ruling has been all too frequently ignored.

In *Deal* II we stated:

> The District Court adopted eighteen findings of fact dealing with specific schools and programs which appellants complained were formulated to promote or perpetuate segregation in the public schools of Cincinnati. Contrary to appellants' contention, the Court found that the schools and programs were not formulated for any such purposes and that school zone lines were not gerrymandered to exclude Negroes from certain schools.
>
> The Court found a high correlation in the distribution of Negroes throughout the school system to the general neighborhood residential patterns. There were many areas, formerly predominately white, which were changed to predominately Negro by the movement of Negroes to the neighborhoods, and this was reflected in the increase in the number of Negro children attending the schools there.
>
> Virtually every possible proportionate combination of Negro and white students exists in some schools in Cincinnati and the proportions are not constant. In a short period of time in which there had been no change in school zone lines, twelve Cincinnati schools changed to a heavy concentration of Negro pupils. *Id.* 1392.

During the eleven years that the *Deal* litigation was in progress, the time of Board personnel has been consumed both in the preparation for trial and in the trial itself. The Board was required to employ counsel who tried the case twice in the District Court, twice in the Court of Appeals and filed briefs twice before the Supreme Court. The expense to the taxpayers of Cincinnati must have been considerable. And now the Board is confronted with a new suit asking for the same relief as in the first case and is sponsored by the same group and handled by the same attorneys. The time of the courts has been taken. If the plaintiffs are to prevail, all of this has been wasted effort and futile. The Board would have been bound if it had lost the case but not the plaintiffs who claim to be exempt from the time-honored rules of res adjudicata and collateral estoppel.

One other matter is noteworthy. In school cases, it has been the practice of counsel for the plaintiff, frequently to file motions in the same case for further relief whenever they wanted to take advantage of a new decision. In the present case they filed no such motion. Why?

Instead, they selected a new class of black children and their parents from not only Cincinnati but drawing from the entire State of Ohio, and they joined as additional defendants certain state officials, including the governor of Ohio. But the class is the same, namely, black children and their parents. Was the purpose of all this an attempt to avoid the issue of res adjudicata and collateral estoppel?

Deal was the first northern school case decided by this court but it did not last long before it was distinguished by other panels. Notable examples are:

Davis v. *School Dist. of Pontiac*, 443 F.2d 573 (6th Cir. 1971), *affirming* 309 F. Supp. 734 (1970), *cert. denied*, 402 U.S. 913 (1971); *Bradley* v. *Milliken*, 484 F.2d 215, 238 (6th Cir. 1973), *rev'd* 418 U.S. 717 (1974).

Deal was distinguished by the en banc panel in *Bradley* v. *Milliken*, *supra*, on the ground that the District Court made findings that there had been no unconstitutional conduct on the part of the Cincinnati Board of Education and we held that these findings were not clearly erroneous. 485 F.2d 258. As I pointed out in my dissenting opinion in *Bradley*, conduct of the Board which the court held was unconstitutional in Detroit was held constitutional in Cincinnati.[1] *Id.* 262.

All of this has been confusing to District Judges hearing school desegregation cases. District Judge Porter admitted having difficulty in reconciling our opinions. In fact, at one of the hearings in the present case when *Deal* was cited

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[1] Dissenting opinions were also filed by Circuit Judges Kent and Miller.

to him he remarked that "*Deal* is as dead as a Dodo bird." Judge Porter changed his mind when he read the decision of the panel in *Higgins* v. *Board of Education of the City of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974), where we relied on *Deal* as authority.

In their petition for rehearing en banc filed in *Higgins*, counsel for plaintiffs confessed their inability, in good conscience, to distinguish *Deal* any further and asked us to overrule *Deal* in important particulars. We declined to accept the invitation.

Now that *Deal* cannot be distinguished any further and we have declined to overrule it, the plaintiffs conceived the idea of a new class suit to desegregate Cincinnati's public schools with a new crop of black children hoping to convince another District Judge on the same evidence and new evidence, which they will introduce, to adopt different findings of fact than did Judge Peck and hoping that this court would then affirm. Such hopes, in my judgment, are an evanescent dream.

We do not follow appellants' argument that their position is supported by public policy. In fact, the reverse is true. As well stated by the Supreme Court in *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948):

> The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac*, 94 U.S. 351, 352. The judgment puts an end to the cause of

> action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, "Res Judicata," 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48.

Appellants' reliance on comments of the Advisory Committee with respect to Rule 23, Federal Rules of Civil Procedure, is misplaced. These rules affect only procedure and have no affect on substantive rights. The Rules Enabling Act so provides. 28 U.S.C. § 2072. See *System Federation No. 91 Ry. Employees' Dept. A.F.L.* v. *Reed*, 180 F.2d 991, 996 (6th Cir 1950); *First Congregational Church and Society of Burlington* v. *Evangelical and Reformed Church*, 305 F.2d 724, 728 (2nd Cir. 1962).

In a headline appearing in the Cincinnati Post on October 3, 1974 entitled "School Suit May Reach Suburbs" one of the plaintiffs' attorneys is alleged to have stated that they will seek to add suburban school districts as defendants and to obtain a court-ordered metropolitan school district that could gain Supreme Court approval. He is quoted as saying:

> The white suburban school districts were built by the state, they are white in terms of faculty and have underlying housing segregation. . . .
>
> The urban system is characterized by racial segregation.

This court had approved such a metropolitan plan for Detroit for busing children into three counties and 52 different school districts but was reversed by the Supreme Court. *Bradley* v. *Milliken*, *supra*. Under this plan black children would be forcibly bused into the suburbs and white children into the inner city by court order.

But before plaintiffs can talk about bringing the Cincinnati suburbs into this case they must first overturn *Deal* I

and *Deal* II, which in my judgment is an unsurmountable objective.

The late Judge Roth who presided at the trial of the Detroit school case made the following statement at a pretrial conference:

> We need not recite the many serious problems such a plan entails, suffice it to say that a plan of such dimensions can hardly be conceived in a day, to say nothing of the time it will require for implementation. A large metropolitan area such as we have in our case can not be made the subject of instant integration. We must bear in mind that the task we are called upon to perform is a social one, which society has been unable to accomplish. In reality, our courts are called upon, in these school cases, to attain a social goal, through the educational system, by using law as a lever. App. IV, pp. 454, 455.

This statement appears to be correct. The federal courts in school desegregation cases are performing a social task using law as a lever. It is not the function of the courts to perform social tasks to attain social goals. The public had been led to believe from the decision in *Brown* v. *Board of Education*, *supra*, that the courts were addressing themselves to adjudicating constitutional violations. In *Brown* the constitutional violation was a state statute which prevented black children from attending white schools.

This problem was solved in Ohio 88 years ago. Black children as well as white children may attend any public school in Cincinnati in the area where they live.

The thesis of *Brown* was that the exclusion of black children from the public schools deprived them of the equal protection of the laws in violation of the Fourteenth Amendment.

Black and white children have equal constitutional rights. The plaintiffs in these school cases are claiming spe-

cial constitutional rights. They are claiming a right to racial balance or quotas in each public school in the system. The only way this can be accomplished is by forced busing of black children into schools located in white neighborhoods and forced busing of white children into the inner city where black families are usually concentrated. This is done by judicial power and without the consent of the parents or the children. The method used is by a head count and determination is made solely by the color of their skin. These children are entitled to the equal protection of the law the same as the plaintiffs. The constitutional rights of other children ought not to be violated in order to accord relief to the plaintiffs. In my opinion no court order should ever force a black or white child away from their residential school without the consent of his parents.

Not all black people are sympathetic to the view of the plaintiffs. I pointed this out in my dissent in *Bradley, id.* 264.

In an article appearing in *U.S. News & World Report*, August 11, 1975 entitled "Busing—Why Tide is Turning," it is stated:

> Problem in Detroit—A spreading view was expressed by Detroit's black Mayor, Coleman Young, in an NBC "Meet the Press" telecast: Busing within the City of Detroit alone, where already over 70% of the pupils are black can solve no problem.[2]

Yet this court has recently ordered the Detroit Board of Education to purchase 150 sixty-six passenger yellow buses, and ordered the State of Michigan to pay 75% of the cost.

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[2] One of a number of articles recently appearing on the news media on busing was written by Michael Novak entitled "Busing—the Arrogance of Power" published in the Wall Street Journal on July 25, 1975, a copy of which is appended hereto as Exhibit "A." Among other things it states: "Busing is, in important ways, the Vietnam of the 1970's. It is a quagmire; a lost cause."

In none of the many school desegregation cases which have been heard by the courts has it ever been held that the Boards of Education were in any manner responsible for the concentration of black people in the inner city.

Dr. Karl Taeuber, in his book *Negroes in Cities*, stated that residential segregation exists "regardless of the character of other forms of discrimination."

In *Bradley* v. *School Board of the City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided court*, 412 U.S. 22 (1973), the court states:

> The root causes of blacks in the inner city are simply not known. . . .

And

> Whatever the basic causes, it has not been school assignments and school assignments cannot reverse that trend.

It is certainly not unnatural for the various ethnic groups to like to live near their own people and this could be the cause of their concentration.

It should be noted that none of the many school desegregation cases which have been decided has ever held that res adjudicata or collateral estoppel does not apply to a case which, as here, has been litigated through all the courts and finally decided. In fact, we know of no other school desegregation case where the plaintiffs, after losing, have ever attempted to relitigate the very issues decided against them in all of the courts. The issue of liability, of course, is to be distinguished from the remedy which is usually held reserved for further consideration.

We ought not to engage in innovation and foster a rule which can only result in mischief.

There must be something radically wrong with plaintiffs' case if we are required to do violence to time-honored legal concepts in order to grant the relief that plaintiffs request.

What they really want is to integrate, by a quota system, not only the public schools in Cincinnati but also those schools in the surrounding suburban municipalities. To accomplish this little children would have to be used as pawns and to be forcibly bused away from their neighborhood schools.

Plessy v. *Ferguson*, 163 U.S. 537 (1896), adopted the doctrine of "separate but equal" in the field of public education. It was the law of this country for more than a half century until it was overturned in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954).

In effect, what plaintiffs want is an "equal but racially balanced" doctrine. In my opinion such a doctrine is not only not required by the Constitution, but it is repugnant to the Constitution as such doctrine would violate the constitutional rights of most of our population. In my opinion if such a doctrine ever became the law, it would subject the people on a nationwide basis to taxation to pay for forced busing costing billions of dollars, which could be used more appropriately to improve the quality of education. It would polarize the races and irreparably harm all of the good which has been accomplished in recent years in civil rights.

Plaintiffs have no more right to racially balanced schools than do other ethnic groups.

I would affirm the judgment of Judge Porter.

EXHIBIT "A"

THE WALL STREET JOURNAL,
FRIDAY, JULY 25, 1975

Busing—the Arrogance of Power

By MICHAEL NOVAK

Busing is, in important ways, the Vietnam of the 1970s. It is a quagmire; a lost cause; taxation without representation; a policy of massive social engineering with little clear prospect of benefit; a mistake; a tragedy; a breeder of endless demonstrations, riots, and dissent.

At last count, only 4% of whites and 9% of blacks favored busing. Only "the best and the brightest," it seems, as in Boston, favor it. They designed it, they impose it, and they will never suffer their children to experience it.

On its face, busing has racist presuppositions. A century ago, hardly literate, immigrant, Catholic young women established a massive parochial school system which soon rivalled the well-financed public schools in the quality of discipline, instruction, and social mobility they imparted. But the assumption behind busing is that blacks, unlike Catholic immigrants, cannot learn in largely separate environments. They need an infusion of "white magic." They can learn only among whites. This is a preposterous assumption. Excellent black schools like Dunbar in Washington give it the lie.

Busing arose as an issue in the South. There the court orders at first had the effect of *halting* busing—of allowing blacks to attend neighborhood schools rather than of being bused away from home to all-black schools.

Judicial Assumptions

Next, busing advanced in the South from being an issue in *de jure* segregation to being an issue in *de facto* segrega-

tion. In cities like Charlotte, historic patterns of residential segregation were diagnosed by the courts as having an unconstitutional effect on equal opportunity in schooling. Here the courts made fresh assumptions: that education in more or less homogeneous neighborhood schools are inequitable; and that historic residential patterns have the force of unjust coercion. (The courts *might* have commanded *residential integration rather than school* integration.)

The structure of the courts' reasoning becomes weaker and more dubious still when Northern cities like Boston, Buffalo, Pittsburgh, Detroit and others come into view. Consider the following propositions:

(1.) The traditional residential patterns of Northern cities over the last 100 years have always involved *de facto* ethnic segregation, not only for blacks, but for virtually every ethnic group.

(2.) In some cases, as in Boston and Detroit, more financial resources, federal programs, and educational experimentation have been lavished on predominantly black schools than on predominantly white ethnic schools of the working class. Rates of entrance into college, drop-out rates, and other indices of the status of such schools are often comparable.

(3.) Before 1900, 90% of all blacks lived in the South; and 90% of the white ethnics who now live in the Northern cities had not yet arrived. These two great migrations were not linked by slavery, were culturally almost totally unprepared for their future meeting, and came to their rendezvous with some different social skills, family traditions, disciplines, needs, and aspirations.

(4.) The average child of black migrants to the North was academically three or four years behind his average white counterpart, even though blacks had English as a

mother tongue. Even today, the average black child is academically at least a year behind the average white.

Busing is, in important ways, the Vietnam of the 1970s. It is a quagmire; a lost cause.

(5.) The patterns of parental discipline in the typical white ethnic home, particularly as between fathers and sons, is quite different from the patterns of discipline in the home, not of middle class blacks, but of the most poor, despairing and suffering blacks.

(6.) The "street culture" of poor black students is of a different moral and emotional "life style" from that of both middle-class black and white ethnic students. In particular, incidences of pre-marital sexual expression, illegitimate birth, hustling, intimidation, and disruptive behavior are significantly different.

(7.) The role of the family or family-substitute in bringing about differential attitudes, behaviors, and success in school is undoubtedly the greatest single factor influencing the classroom. The family is a more basic social unit than the school.

(8.) Class factors influence dramatically the attitudes, behaviors, aspirations and educational success of students in school.

(9.) Families choose their place of residence—or judge its merit—by their preference for its neighborhood school as much as, or more than, by any other factor.

If these propositions are true, then it must surely be predictable that 96% of the whites and 91% of the blacks would find busing a poor instrument for what a great majority, both black and white, also desire: a genuinely, peacefully integrated society.

What seems to have been forgotten is that busing is merely an *instrument*, a *tool*, a *method* not an end. The

most appropriate question with respect to busing, as for any instrument, is "Does it work?" However moral the instrument may sound, "What are its effects?" is the central moral question.

In my view, busing of the Boston and Detroit sort is an immoral policy. It goes against the basic social principles of American life; against family, neighborhood, class, ethnic, and even educational realities which are so basic they are seldom even voiced. Working-class whites who are bused have too much to lose; they face possible downward mobility. Working-class blacks or poor blacks have too little to gain; indeed, the ensuing experience of cultural segregation within the purportedly integrated schools can be embittering.

It would be lovely if greater contacts between persons from different cultures always led to greater understanding and good will. In fact, contact often reinforces the worst stereotypes. This is particularly likely where the contact is unequal—when those of a more suffering lower class, educationally behind their peers, become tangible proof to other children of realities they had heretofore held to be mere bigotry.

Human beings are not parts of a machine, to be anonymously fitted into slots. They approach each other from complicated past histories and diverse personal experiences. They do not perceive each other accurately, or easily find it possible to share honest transactions. Even highly educated blacks and whites often find honesty anguishingly difficult. What, then, about the less articulate? To ride roughshod over such histories is to exhibit gross human arrogance. It is to invite great human disaster. It is to destroy integration in the name of saving it.

Embittering a Generation

Forced busing will set back the advances of civil rights made during the past generation by 20 years; a whole

generation, and maybe another, will be embittered, just as South Boston and Roxbury are likely to be for decades to come. Family folklore will recount the ugly history for years.

Busing is to black equality what Prohibition was to the moral crisis of the Depression. It is a flaming moral issue of dubious social judgment. Now, as then, the fundamental problem is economic.

Blacks do not need buses; they need jobs. Having acquired solid jobs, the black family will have an economic base. Then school will be meaningful, and its lessons liberating and inspiring. The key to integration in the United States is a plan to allow every available black worker to work; and to rebuild and to beautify black homes and neighborhoods. For families increase their net worth not so much through wages as through real estate.

Most black neighborhoods were, hardly a generation ago, among the most solidly built and desirable in the Northern cities; restored, they would be far more valuable—as investments—than the flimsy modern housing of working-class suburbs. Under improved economic conditions, a black middle class and working class will integrate with whites as economic, social, cultural, and educational equals.

Economics first, education second. A cardinal principle both of Marx and of capitalism cannot be all wrong.

Mr. Novak is the author of the recently published book "Choosing Our King."

APPENDIX B

No. 75-1244

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONA BRONSON, ETC. ET AL.,
Plaintiffs-Petitioners,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, ET AL.,
Defendants-Respondents.

On Petition for Permission to Appeal from Interlocutory Order

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Decided and Filed February 28, 1975

Before: PHILLIPS, Chief Judge, and WEICK and LIVELY, Circuit Judges.

PER CURIAM. Plaintiffs-petitioners in this school desegregation case have filed a petition for permission to appeal, pursuant to 28 U.S.C. § 1292(b), Fed. R. App. P. 5, from an interlocutory order of the United States District Court for the Southern District of Ohio, Western Division.

A former school desegregation case involving Cincinnati schools was *Deal* v. *Cincinnati Board of Education*, 244 F. Supp. 572 (S.D. Ohio 1965), *aff'd*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967), *aff'd on other issues*, 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971).

One of the questions in the school desegregation case now pending in the District Court is whether the defendant school board is entitled to interpose the affirmative defense of *res judicata* as to factual issues determined in *Deal*. On January 30, 1975, the District Court entered an order, accompanied by a memorandum opinion ruling "that defendants may properly assert the affirmative defense of *res judicata* in the present case, or, more precisely, that they may assert here the collateral estoppel aspect of that general doctrine." The effect of this ruling appears to be that plaintiffs would be collaterally estopped from relitigating any of the issues determined in the prior litigation between the plaintiffs in the earlier class action and the defendant board and from introducing evidence as to events occurring prior to July 26, 1965.

The District Court made the following certification:

> The court is of the opinion that the *res judicata* issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

In their petition for permission to appeal, plaintiffs-petitioners suggest that this matter is of exceptional importance so as to warrant in banc consideration, pursuant to Fed. R. App. P. 35(b) and Sixth Circuit R. 3(b). No judge of the court has moved for in banc consideration.[1] The petition for leave to appeal has been assigned to this three-judge panel. 28 U.S.C. § 46.

Upon consideration, the court concludes that the petition for permission to appeal should be granted. It is so ORDERED.

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[1] Circuit Judge John W. Peck, author of the District Court opinion in *Deal*, has recused himself from any participation in this case, including the issue of in banc determination.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 1 74-205

MONA BRONSON, by her parent and next friend CHARLES BRONSON, et al.,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, et al.,

Defendants.

OPINION ON MOTION TO DETERMINE AFFIRMATIVE DEFENSE OF RES JUDICATA

Filed January 30, 1975

PORTER, J.:

This is a school desegregation case, the second such case for Cincinnati. As everyone knows, the first was litigated for six years and terminated in 1968. It has been evident from the outset of the instant case that a key question would be the effect of the first case on the second. It has likewise been apparent that this question must be resolved before the case can proceed to a conclusion.

The question is before the Court because the various defendants have asserted the defense of res judicata and the plaintiffs have filed a motion to "determine" such defense. As we view it, the question has two main points. The first is whether facts regarding alleged segregative

intent were actually litigated by the parties in *Deal* I and II, *infra*, so as to bar relitigation of the Court's findings on gerrymandering, assignment of teachers, and other indicia of the existence of segregative intent. The second is whether *Deal* is still good law for the proposition that racial imbalance alone is no warrant for relief where such imbalance has not been caused by any act of discrimination on the part of defendants. Another way of stating this is whether or not *Deal* I and II are still good law for upholding the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials.

The first point is squarely before the Court because the aspect of *res judicata* applicable to this case (collateral estoppel) only bars relitigation of facts and issues which were actually contested by the parties in the former action. The second point is also before us because plaintiffs claim there have been drastic changes in the law since *Deal* I and II were decided and that *res judicata* is therefore inapplicable. Hence, it is necessary to determine whether *Deal* is still good law.

We conclude that matters relating to segregative intent were litigated in *Deal* and that the defense of *res judicata* may be asserted. As that suggests, we also conclude that the changes in the law since *Deal* have not been so drastic as to require the opposite result. In other words, *Deal* retains vitality because the law still provides that racial imbalance alone is not violative of the Constitution and that a neighborhood school policy is a constitutionally permissible concept.

This is not to say that the law has remained unchanged in the years since *Deal* I and II were decided, for there have been developments and refinements in the law, as might have been expected in view of the fact that *Deal* was one of the first school desegregation cases to be

brought outside the South.[1] It is now clear, for example, that where a dual school system (one for whites and another for blacks) has been shown to exist, *Deal* may not be used to justify a remedial plan focusing simply on a neighborhood school concept. And, even where there has been no showing of duality or prior deliberate discrimination, a school board should certainly consider reasonable ways to alleviate racial imbalance and a failure to act in this regard could be part of the cumulative evidence of a possible constitutional violation in certain circumstances. The case law is not always easy to reconcile and we recognize the difficult problems facing local school authorities charged with the responsibility of providing quality integrated education within the bounds of economic and administrative feasibility.

While resolution of the question about the vitality of *Deal* does not foretell the outcome of this litigation, it does, of course, have a bearing on it. Thus, if *Deal* I and II are *res judicata* in the *Bronson* case, as we have concluded, *Bronson* is limited to an inquiry as to the existence of segregative intent in the period since *Deal* I and II. The importance of the *res judicata* question thus merits a full discussion. This includes a description of the procedural background and conclusions as to the applicable principles of *res judicata* and collateral estoppel. It also includes a discussion of the assertions made by the plaintiffs (and minority board members) that *Deal* is no longer good law and that it should not, therefore, bar relitigation of matters previously adjudicated. We discuss at some length plaintiffs' claim that there is now an affirmative duty on the part of boards to "do something" about racial imbal-

[1] For an article which attempts to put *Deal* in perspective, both legally and historically, see Herbst, "The Legal Struggle to Integrate Schools in the North," appearing at p. 43 of Blacks and the Law, The Annals of the American Academy of Political and Social Science (May, 1973).

ance, even though caused by factors such as shifting neighborhood patterns beyond the school board's control. We conclude that the class of plaintiffs in this case is substantially the same as in *Deal* and that the defense of *res judicata* may be asserted by all the *Bronson* defendants. If this discussion includes observations not necessary to the opinion, it is in an attempt to shed light on certain problems unique to a school desegregation case, such as this, which follows an earlier one wherein the defendant school district had prevailed. The discussion is in depth in an attempt to facilitate the hoped-for expedited review.

I. PROCEDURAL BACKGROUND

On December 30, 1974, plaintiffs filed a motion (doc. 53) in which they request this Court "to resolve the issue raised by the affirmative defense of *res judicata* set forth in the answers of the defendant Board of Education of the City School District of the City of Cincinnati, the defendant Martin W. Essex and the Ohio State Board of Education, as well as defendants John J. Gilligan and William J. Brown." Prior to submission of this motion, briefs dealing directly and indirectly with the *res judicata* issue were filed by plaintiffs (doc. 20), defendant Cincinnati Board of Education [2] (docs. 18 and 22), and defendants Brown and Temple [3] (doc. 19).

[2] We shall refer to the Cincinnati Board of Education variously as the Cincinnati School Board or simply the board, and we note at this time that the following defendants are all represented by the same counsel: (a) the Cincinnati School Board; (b) the individual "majority" members of said board, namely, Robert L. Braddock, Virginia A. Griffin, Henry C. Kasson, Charles D. Lindberg, and Mary T. Schloss; and (c) the Superintendent of the Cincinnati Public Schools, Donald R. Waldrip.

[3] Defendants Robert S. Brown and Ronald J. Temple are "minority" members of the Cincinnati School Board and are represented herein by separate counsel. They are referred to as "bogus defendants" by the Cincinnati School Board (doc. 22, p. 12).

The *res judicata* issue arises as a result of earlier litigation between the same class of plaintiffs that we now have in the present case and the Cincinnati Board of Education (plus its then superintendent and individual board members). That litigation is cited as *Deal* v. *Cincinnati Bd. of Ed.*, 244 F. Supp. 572 (S.D.O., 1965), aff'd 369 F. 2d 55 (6 Cir., 1966), cert. den. 389 U.S. 847 (1967), and aff'd on other issues, 419 F. 2d 1387 (6 Cir., 1969), cert. den., 402 U.S. 962 (1971). The original decision in *Deal* was handed down by then District Judge Peck on July 26, 1965, and was affirmed in part and remanded in part on December 6, 1966 (369 F. 2d 55). This initial phase of the litigation is sometimes referred to as *Deal* I. Pursuant to remand, proceedings were again held in this Court, culminating in Judge Peck's "Memorandum and Subsidiary Findings of Fact" filed September 30, 1968, which memorandum was affirmed on December 9, 1969 (419 F. 2d 1387). This second phase of the litigation is sometimes referred to as *Deal* II. The opinion of the Court of Appeals in *Deal* II includes an Appendix containing Judge Peck's September 30, 1968 memorandum and findings of fact.

The defendant Cincinnati Board of Education prevailed in the *Deal* litigation, which extended over a period of six years. Without attempting to explore all the conclusions of law in *Deal* I and II, it is enough to observe here, as we did above, that *Deal* stands generally for the proposition that school officials have no strict constitutional duty to relieve racial imbalance in the public schools where such imbalance is not caused by acts of discrimination on their part. As it is here, the intent of the board was a critical question in *Deal*, and the Court found no segregative intent and, therefore, no dual system. The Court's findings included the following:

> ". . . it is found and determined that neither gerrymandering nor any other alleged discriminatory practice on the part of the Board brought about such racial imbalance as existed, . . ." 419 F. 2d, at 1398.
>
> * * * * *
>
> "16. There is no inequality of educational facilities based upon racial classification of students in the Cincinnati Public Schools." 419 F. 2d, at 1401.

In reviewing the District Court's decision, the Court of Appeals said, *inter alia*:

> "There is no evidence in the record that the Board assigned teachers or other staff members on the basis of race. The evidence demonstrates the contrary, namely, that the Board was actively attempting to integrate its staff at all levels, and that to do so it had to consider the race of the person to be assigned."

In view of the outcome of the *Deal* litigation, defendant Cincinnati School Board asserts that all of the rights of the class whom plaintiffs seek to represent "were fully and finally adjudicated" and that "it was finally determined that the defendant Board did not commit any segregatory or discriminatory acts" (doc. 25, p. 6). Further, the School Board contends (doc. 25, p. 9):

> "That, by virtue of the findings made by this Court on September 30, 1968 in the *Deal* case, plaintiffs are barred absolutely, under the doctrine of *res judicata*, from relitigating any policy, practice, procedure, act, custom, or usage of the defendant Board as of that date. . . ."

The various state defendants[•] also assert that "this action is barred, in whole or in part, by the doctrine of *res judicata*" (doc. 8, p.6; doc. 9, p.6; and doc. 10, p.6).

[•] By "state defendants" we mean to refer to Martin W. Essex and the Ohio State Board of Education, and also to John J. Gilligan and William J. Brown.

II. COLLATERAL ESTOPPEL

We turn now to an examination of the doctrine of *res judicata*. *Res judicata* is a broad term encompassing the various ways in which a judgment in one action will have a binding effect in a subsequent action. It is important to note, however, that the doctrine has two distinct aspects. See *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876). One aspect deals with the lethal effect of a judgment as an absolute bar to the prosecution of a second action based upon the identical claim or cause of action. This aspect is sometimes referred to as direct estoppel by judgment, or bar and merger. The other aspect involves the more limited effect of precluding the relitigation of particular facts or issues in a second action on a different claim. This aspect has sometimes been referred to as collateral estoppel, or collateral estoppel by judgment. See, generally, F. James, Civil Procedure § 11.19 (1965); 46 Am. Jur. 2d, Judgments §§ 396, 397.

Defendants herein do not suggest that *Deal* should act as an absolute bar to the prosecution of the instant dispute. Instead, they urge that this Court is precluded from considering "any allegations of unconstitutional practice on the part of the defendant Board prior to September 30, 1968" and that to prevail, plaintiffs must show "that the defendants have, since that date, engaged in . . . conduct which has deprived the class of plaintiffs of its constitutional rights" (doc. 18, pp. 3-4). Hence, we are here concerned with the collateral estoppel aspect of the doctrine of *res judicata*.

Collateral estoppel precludes the relitigation of essential facts or issues which were previously litigated by the parties (or their privies) and judicially determined. On the surface, it would appear that the defense of collateral estoppel is unavailable to the state defendants (who were not parties to the *Deal* litigation), since the conduct of

those defendants was never directly at issue in *Deal* and certainly never the subject of any judicial determination. Indeed, Judge Peck specifically held (244 F. Supp., at 579):

> ". . . that in an action against a board of education charging segregation or failure to desegregate pupils in the school system such board is in no way responsible for action taken or omitted by other public or private agencies or entities and that evidence thereof is not admissible in such an action."

The above statements notwithstanding, however, it does appear that, to the extent plaintiffs seek to attribute responsibility for alleged transgressions of the Cincinnati School Board to the state defendants, collateral estoppel might inure to the benefit of said defendants. More will be said later on this general issue of "party identity"—both as it pertains to the state defendants and as it pertains to the plaintiffs herein.

III. ISSUE IDENTITY

Contending that collateral estoppel is inapplicable here, plaintiffs first urge that the issues which were litigated in *Deal* "could not be more dissimilar" (doc. 20, p. 5) to the issues presently before us. In short, it is urged that the *Bronson* plaintiffs are proceeding on a *de jure* theory, whereas the *Deal* plaintiffs were proceeding only on a *de facto* theory. An examination of the *Deal* complaint and opinions, however, demonstrates convincingly that *de jure* allegations were made and litigated in *Deal*. As the defendant Cincinnati School Board points out, the *Deal* complaint alleged specific acts by the board which were claimed to have the purpose of denying black students their equal protection rights under the Fourteenth Amendment. For example, ¶ 16 of the *Deal* plaintiffs' amended complaint alleged that defendants had "created arbitrary attendance

districts and zones in such a manner as to establish and perpetuate a racially segregated school system within the City of Cincinnati" (doc. 22, p. 3).

Even more revealing is the opinion of the Sixth Circuit in *Deal* I where the Court declares (369 F. 2d, at 63):

> ". . . appellants assert that they have sufficiently shown that the Board of Education has *intentionally* caused, and then failed to eliminate, serious racial imbalance in the Cincinnati public schools, has afforded Negro children who are confined to segregated schools, inferior educational programs and facilities, and has provided school faculties and personnel which reflect the racial patterns of students." (Emphasis in original.)

Describing the numerous specific allegations "concerning matters such as alleged discrimination in school attendance, zoning, transportation policies, teacher selection and assignment, comparative test results, and policies on transfers and overcrowding of students" (*id.*, at 64), the Court noted that no findings had been made on those disputed issues and that "[w]ithout findings we are unable to determine whether discrimination existed with respect to specific schools and programs" (*id.*, at 65). Hence, the Sixth Circuit felt that Judge Peck's general findings regarding the absence of intentional segregation did not present an adequate basis for review, and that this purposeful aspect of the case should be remanded for subsidiary findings of fact. As noted earlier, Judge Peck subsequently did file subsidiary findings wherein he found no purposeful discrimination on the part of the Board. In view of the foregoing, we think that the facts regarding alleged segregative intent on the part of the Board were actually litigated by the parties in *Deal*, and that Judge Peck necessarily reached determinations regarding *de jure* (as well as *de facto*) segregation.

IV. CHANGES IN THE LAW

A. Affirmative Duty

Plaintiffs next urge that collateral estoppel is inapplicable here because there have been significant changes in the law since the last factual consideration by the District Court in *Deal*. Plaintiffs and defendants agree that "*res judicata* is no defense where, between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *State Farm Mutual Auto Insurance Co.* v. *Duel*, 324 U.S. 154, 162 (1945). See also, *Christian* v. *Jemison*, 303 F. 2d 52 (5 Cir., 1962). In *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948), the Supreme Court said that collateral estoppel was "not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers" (at 599), and "a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable" (at 600). See also, *Blair* v. *Commissioner*, 300 U.S. 5 (1937). But the Cincinnati School Board contends that the controlling legal principle of *Deal* has not changed and that, indeed, it has been strengthened and reinforced in the intervening years.

According to plaintiffs (as well as defendants Brown and Temple) the law since *Deal* has changed to such an extent that school authorities now have an affirmative duty to eliminate racial imbalance. Plaintiffs specifically cite *Green* v. *New Kent County*, 391 U.S. 430 (1968) and its two companion cases of *Raney* v. *Board of Education of Gould*, 391 U.S. 443 (1968) and *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968), as support for that general proposition. Before examining that argument in depth, however, it must be remembered that any changes in legal theory which may have been developed by the *Green* trilogy were available to the Court of Appeals when it decided *Deal* II.

Indeed, those very cases were discussed by the Sixth Circuit as follows (419 F. 2d, at 1390):

> ". . . The denial of certiorari in the present case ought to constitute our opinion in the first appeal as the law of the case, but appellants contend that the law has been changed by the recent decisions of the Supreme Court in Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968); Raney v. Bd. of Educ. of Gould School District, 391 U.S. 443 (1968); Monroe v. Bd. of Comm'rs of City of Jackson, 391 U.S. 450 (1968).
>
> "In our opinion, these three decisions did not change any law applicable to our case and appellants' reliance on them is misplaced."

We believe such examples of "misplaced reliance" are, in large measure, the result of a failure to make clear distinctions between the "violation" and the "remedy" types (or phases) of desegregation suits. Violation cases are those involving the initial questions of whether or not there was a constitutional violation requiring desegregation. Remedy cases are those wherein a violation has been established and the questions before the courts pertain to the scope of the remedy and the means available. It is, of course, now crystal clear that school authorities have an affirmative duty to desegregate "root and branch" where a state-imposed dual school system has been shown to exist in violation of the Equal Protection Clause. See, *e.g.*, *Green*, *supra*, at 437-38; *Keyes* v. *School Dist. No. 1 Denver, Colo.*, 413 U.S. 189, 203 (1973). *Deal*, however, is one of a number of "violation" cases which hold that no such affirmative duty exists in the absence of a showing of duality or *de jure* segregation. Although plaintiffs (and defendants Brown and Temple) cite numerous cases for the proposition that *Deal* is now obsolete and erroneous, we feel that reliance on many of those cases is as misplaced

as was the aforementioned reliance on the *Green* trilogy. We shall, therefore, refrain from distinguishing and addressing each of them in turn. Instead, we shall gauge the vitality of *Deal* by referring to two of the most recent desegregation decisions of the Sixth Circuit: *Higgins, et al.* v. *Grand Rapids Bd. of Ed.*, . . . F. 2d . . . (6th Cir., Dec. 6, 1974) No. 73-2198;[5] and *Oliver, et al.* v. *Michigan State Bd. of Ed., et al.*, . . . F. 2d . . . (6 Cir., December 9, 1974) Nos. 74-1104-05.

In *Oliver*, we find the following concise summary of the basic elements of school desegregation law (at p. 7 of the slip opinion):

> "A finding of de jure segregation requires a showing of three elements: (1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools. A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof *unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.*" (Emphasis added; citations omitted.)

We stress the "unless" clause above as one indication that *Deal* retains vitality today. But *Higgins* is far more specific, and particularly relevant to the issue at hand. In that case the Court stated (at pp. 17-18 of the slip opinion):

> ". . . Plaintiffs contend that *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55 (6th Cir. 1966) *cert. denied* 389 U.S. 847 (1967), is no longer good law

[5] A petition for rehearing was filed on December 30, 1974 and remains pending at this time.

for the proposition that '[w]hen no discrimination is shown, racial imbalance alone is no warrant for relief.' *Deal* followed both the 10th Circuit, *Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965), and the 7th Circuit, *Bell* v. *School, City of Gary*, 324 F. 2d 209 (7th Cir. 1963), *cert. denied* 377 U.S. 924 (1964), in upholding the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials. While there are cases in which purported neighborhood school systems have been found to be discriminatory, these cases are factually distinguishable from *Deal* which we deem to be controlling here. . . ."

The *Higgins* Court acknowledged that there were decisions *contra* in other circuits, but dismissed those decisions as being inconsistent with the rationale of *Keyes*. After examining and distinguishing various recent cases on their facts, the Court concluded as follows (at p. 19 of the slip opinion):

> "It is thus seen that the law imposes no affirmative duty upon school officials to correct the effects of segregation resulting from factors over which they have no control. Neither are they operating a dual system when they fail accurately to anticipate the full effect of their racially neutral retention of a neighborhood school system, absent a finding of segregative intent."

We are constrained to observe that not all of the Sixth Circuit decisions since *Deal* are easily reconciled. For example, in *Berry* v. *School Dist. of City of Benton Harbor, Mich.*, 505 F. 2d 238 (6 Cir., 1974) the Court found that plaintiffs had made out a *prima facie* case of *de jure* segregation and remanded to see if that case could be negated by defendants. While refusing to hold as a matter of law that

defendants had an affirmative duty to alter attendance lines, the *Benton Harbor* Court did declare (at p. 243) that defendants' decision "not to adopt new attendance boundaries in the face of a readily discernable pattern of residential segregation may be considered part of the cumulative evidence of a possible constitutional violation." And in passing the Court further observed (at p. 243) that "[i]t is not necessary to prove discriminatory motive, purpose, or intent as a prerequisite to establishing an equal protection violation when discriminatory effect has been demonstrated."

At first glance the above *Benton Harbor* excerpts seem at odds with the principles of *Deal*. Upon reflection, however, such excerpts may merely represent modifications or refinements of a well-established theme—*i.e.*, there is no affirmative duty to alleviate or eliminate segregation, but failure to do so may support an inference of segregative intent in certain circumstances. Indeed, this sort of "reconciliation" was suggested in *Higgins* where the Court conceded that (*supra*, at p. 22):

> "While it is true that a court may *infer* such an intent from the circumstances there is no authority for the proposition that such an intent *must* be inferred in all cases where segregated patterns exist in fact. The inference is permissible, not mandatory." (Emphasis in original.)

Notwithstanding what seem to be occasional inconsistencies in the case law, and notwithstanding certain modifications in the law, the clear import of the recent Sixth Circuit decisions is that the principal *Deal* holding remains good law—*i.e.*, school authorities have no strict constitutional duty to take affirmative action to relieve racial imbalance in the public schools where such imbalance is not caused by any act of discrimination on their part. In sum,

we cannot conclude that *Deal* has become so "obsolete or erroneous with time" as to render the rule of collateral estoppel inequitable and inapplicable. See, *Sunnen, supra.*

B. Burden of Proof

In addition to the affirmative duty argument, defendants Brown and Temple argue that "there has been a substantial change in case law for the burden of proof now rests with the defendant school authorities and not the plaintiffs to prove by clear and convincing evidence that they are in compliance with school desegregation law" (doc. 19, p. 7).

Without deciding at this point whether an evidentiary change of this nature is the vital or dramatic sort of change which would foreclose a collateral estoppel defense, we turn now to a consideration of whether the alleged "substantial change" has in fact occurred. In *Swann* v. *Board of Education*, 402 U.S. 1, 18 (1971), the Supreme Court stated that in a system with a history of state-enforced dual schools,

> ". . . where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown."

Further the *Swann* Court observed (at p. 26):

> ". . . in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such

> schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part."

Subsequently, in *Keyes, supra,* at 210, a majority of the Supreme Court expanded the *Swann* holding:

> ". . . Nor is this burden-shifting principle limited to former statutory dual systems. See, *e.g., Davis* v. *School District of the City of Pontiac,* 309 F. Supp. 734, 743, 744 (ED Mich. 1970), aff'd, 443 F. 2d 573 (CA 6 1971); *United States* v. *School District No 151,* 301 F. Supp. 201, 228 (ND Ill. 1969), modified on other grounds, 432 F. 2d 1147 (CA 7 1970). Indeed, to say that a system has a 'history of segregation' is merely to say that a pattern of intentional segregation has been established in the past. Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts."

The *Keyes* majority thus seems to hold that the mere existence of a "substantial" (at 203) or "meaningful" degree of segregated schooling constitutes a *prima facie* case of *de jure* segregation in situations where:

> (1) there was statutory duality at the time *Brown* I was decided; or
> (2) there was a prior finding of meaningful segregative action taken with segregative intent by school authorities—*i.e.,* where a past "pattern of intentional segregation has been established."

Arguably, then, the *Keyes* majority would refuse to apply the burden-shifting principle in cases where there

was no statutory duality at the time of *Brown* I, or where there was no prior finding of intentional segregation. And, arguably, a *prima facie* case could not be made against the Cincinnati School Board—especially in light of Judge Peck's finding that, despite plaintiffs' "unrestricted access to all of defendants' files and records for some two and a half years" (244 F. Supp. at 582), no purposeful segregation on the part of the board had been shown.

Justice Powell's opinion in *Keyes* (affirming in part and dissenting in part) reinforces our belief that, by the majority view, a *prima facie* case of constitutional violation is not established *whenever* public school segregation is shown to exist in a substantial degree. Justice Powell, of course, vigorously decried the majority's adherence to the *de facto/de jure* distinction. In that connection, Justice Powell said (at p. 232):

> ". . . The net result of the Court's language, however, is the application of an *effect* test to the actions of southern school districts and an *intent* test to those in other sections, at least until an initial *de jure* finding for those districts can be made. Rather than straining to perpetuate any such dual standard, we should hold forthrightly that significant segregated school conditions in any section of the country are a prima facie violation of constitutional rights. . . ." (Emphasis in original.)

And reiterating (at p. 235), he stated that ". . . we should acknowledge that *whenever* public school segregation exists to a substantial degree there is *prima facie* evidence of a constitutional violation by the responsible school board." (Emphasis added.)

In our opinion, then, developments in the law with regard to the burden of proof do not render *Deal* obsolete or erroneous. We do not think the law has changed in a manner which would have affected the *Deal* litigation since, even today, a *prima facie* case is made out only in certain limited situations which were not present in *Deal* and which, arguably, are not present today. But even if we were to assume that a *prima facie* case could somehow have been established against the *Deal* defendants, we do not think plaintiffs would have prevailed in view of Judge Peck's findings that such segregated schooling as did exist (*e.g.*, imbalanced composition of student bodies) [6] was not brought about by any discriminatory practice on the part of the *Deal* defendants. Those findings are significant because the burden-shifting concept is evidentiary in nature, and it is well established that school authorities can rebut a *prima facie* case of purposeful segregation by showing that "segregative intent was not among the factors that motivated their actions" or that "its past segregative acts did not create or contribute to the current segregated condition." *Keyes, supra*, at 210-11. See also, *Higgins, supra*, at 21. In short, it seems (based upon Judge Peck's findings) that any *prima facie* case in *Deal* was, or would have been, rebutted by defendants.

C. Public Policy

Specific mention should perhaps be made of plaintiffs' argument that "public policy" considerations should preclude the application of collateral estoppel in this case. For all practical purposes, we have already dealt with this argument by determining that there have been no dramatic intervening changes in the law rendering *Deal* erroneous and thereby rendering any perpetuation of the *Deal* findings inequitable. Nevertheless, we feel we should again point out that many of the cases cited by plaintiffs in support of their "public policy" argument are remedy, rather than violation, cases. Moreover, we believe that the well-known policy considerations underlying the doctrine of col-

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[6] With regard to certain indicia, such as educational facilities Judge Peck found that segregated schooling did not exist. See, *e.g.*, ¶ 16, 419 F. 2d, at 1401.

lateral estoppel call for its application in this case. See, *e.g.*, 46 Am. Jur. 2d, Judgments § 395.

V. PARTY IDENTITY

We stated earlier that we would return to the issue of party identity since collateral estoppel traditionally precludes only the relitigation of essential facts or issues which were previously litigated by the parties or their privies. In this regard, we note first that substantial identity is all that is necessary, and that privity is deemed to exist if there is some connection between the present and former parties such that it is fair and reasonable that the present party be bound by the prior determinations. See, 46 Am. Jur. 2d, Judgments §§ 531-32. And we further recognize that these concepts of substantial identity and privity may be extended to class actions. See, *e.g.*, *Hansberry* v. *Lee*, 311 U.S. 32, 41-43 (1940). Applying these concepts to the case at hand, we conclude that the present class of plaintiffs is substantially the same as in *Deal*, and that it would be both fair and reasonable to bind the present plaintiffs by the *Deal* determinations.

The state defendants, who were not parties to the *Deal* litigation, present a slightly different problem. We recognize that in applying *res judicata* principles courts have traditionally adhered to the concept of mutuality—*i.e.*, courts have insisted that the party claiming the benefit of collateral estoppel be one who would have been bound to his detriment had the judgment gone the other way. But an exception to mutuality is recognized where the party asserting collateral estoppel is sought to be held vicariously liable for the acts of another who was exonerated in the former action. See, *Bigelow* v. *Old Dominion Copper Mining and Smelting Co.*, 225 U.S. 111 (1912). Moreover, the modern trend is to discard the rule of mutuality—especially where collateral estoppel is sought to be asserted defensively by someone who was not a party nor a privy

in the original action. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971); *Lynne Carol Fashions, Inc.* v. *Cranston Print Works Co.*, 453 F. 2d 1177 (3 Cir., 1972); *Rachal* v. *Hill*, 435 F. 2d 59, 61-62 (5 Cir., 1970), cert. den., 403 U.S. 904 (1971); *Fleisher* v. *Paramount Pictures Corp.*, 329 F. 2d 424 (2 Cir., 1964), cert. den., 379 U.S. 835.

For the above reasons, we conclude that the defense of collateral estoppel may be properly asserted herein by the state defendants.

VI. CONCLUSION

It remains only to define the consequences of the collateral estoppel defense as it applies to the case at hand. Basically, our decision that collateral estoppel is applicable herein means that the parties must accept Judge Peck's findings of fact, and that the parties will be prohibited from relitigating those factual determinations. We refer not only to the geenral finding rendered in *Deal* I (that racial imbalance in the Cincinnati Public Schools was not intentionally caused by the Board of Education), but also to the specific subsidiary findings of *Deal* II which we believe were actually litigated and necessarily determined in order to resolve the question of "whether discrimination existed with respect to specific schools and programs" (369 F. 2d, at 65), and in order to resolve the larger overriding question of whether black pupils in the Cincinnati Public Schools were being denied equal protection of the law in contravention of the Fourteenth Amendment.

Although we have agreed that collateral estoppel is applicable to the present case, we can not accept the defendant board's contentions that Judge Peck's findings were based upon occurrences and developments through September 30, 1968. The initial *Deal* decision was rendered by Judge Peck on July 26, 1965. That decision was, of course,

appealed and the case was eventually returned to the District Court for supplemental findings. Judge Peck entered such findings on September 30, 1968, after allowing plaintiffs to bring into the case any events occurring during the interval between the initial hearing and the remand. Plaintiffs did not take advantage of this opportunity, and, accordingly, Judge Peck limited his supplemental findings to the evidence adduced prior to his decision of July 26, 1965. Thus, occurrences and developments which transpired between July, 1965 and September, 1968, were not actually litigated by the parties, and the present plaintiffs can only be collaterally estopped from inquiring into factual determinations preceding the 1965 decree. This view is further confirmed by Judge Peck's remark (419 F. 2d, at 1396) that those intervening events would properly be the subject of a separate law suit:

> ". . . Parenthetically, we offer the view that if there have indeed been intervening occurrences and developments constituting invasions of constitutional rights, they could appropriately form the basis of separate litigation, even though they may not properly be appended to the present action."

As an aside, we note that the findings of fact referred to above were based to a considerable extent upon a sizeable stipulation which is still a matter of record, and which Judge Peck described as a "meticulously prepared document consisting of 71 pages, exclusive of 24 pages of carefully arranged Contents and lists of exhibits" (244 F. Supp., at 579). We merely take this opportunity to encourage submission of comparable stipulations in the present case.

For the foregoing reasons we conclude and have therefore ordered, that defendants may properly assert the affirmative defense of *res judicata* in the present case, or, more precisely, that they may assert here the collateral estoppel aspect of that general doctrine.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 1 74-205

MONA BRONSON, by her parent and next friend CHARLES BRONSON, et al.,
Plaintiffs,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, et al.,
Defendants.

ORDER

Filed January 30, 1975

Pursuant to an agreement of counsel at Pretrial No. 3 (November 20, 1974) (tr. 6), plaintiffs herein filed a "Motion to Determine the Affirmative Defense" [of *res judicata*] (doc. 53). This was submitted on the exhaustive briefs previously submitted regarding the vitality of *Deal* (docs. 18, 19, 20, and 22). In the Court's view the plaintiffs' motion is similar to a motion to strike an insufficient defense under Rule 12(f), Fed. R. Civ. P., or an "objection of failure to state a legal defense" under Rule 12(h)(2), Fed .R. Civ .P.

Considering the motion as one filed pursuant to Rule 12(f), we note that the motion is not timely filed, but conclude that it is nevertheless appropriate for us to consider the motion in view of the authority given to the Court by Rule 12(f) to strike an insufficient defense on its "own initiative at any time." 5 Wright & Miller, Federal Practice and Procedure § 1380, pp. 784-5.

For reasons set out in an opinion filed simultaneously with this order, the Court concludes that the motion is not well taken and it is therefore denied.

In plaintiffs' motion they request that, regardless of which way this issue is determined, the Court make a certification pursuant to 28 U.S.C. § 1292(b). As the Court understands it, such request is joined in by all parties in recognition of the need to get this issue settled before the case can proceed (Pretrial No. 3, Nov. 20, 1974 (tr. 8)), The Court is of the opinion that the *res judicata* issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

So ordered.

/s/ DAVID S. PORTER
United States District Judge

APPENDIX D

No. 75-1244

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONA BRONSON, et al.,
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, et al.,
Defendants-Appellees.

ORDER

Filed October 30, 1975

BEFORE: PHILLIPS, Chief Judge; WEICK and LIVELY, Circuit Judges.

Upon consideration of the petition for rehearing filed herein the court concludes that a rehearing of this interlocutory appeal is not required.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

WEICK, Circuit Judge, dissenting. The petition for rehearing filed by the Board requests that we clarify our resolution of certain questions in this case in order to provide necessary guidance for the District Court upon the remand.

In my dissenting opinion I specifically pointed out the parts in both majority and concurring opinions with which I disagreed. It is obvious that I agreed with the part of the majority opinion "that Deal I and II continue to have 'vitality.'" Our recent decision, in which two members of the present panel participated, in *Higgins* v. *Board of Educ. of Grand Rapids*, 508 F. 2d 779 (6th Cir. 1974), is further proof of that fact.

I also stated in my dissent:

> The Board can be held accountable only for any new acts and conduct subsequent to the cut-off date of July 16, 1965 and not authorized or approved in *Deal.*

This clearly agrees with the holding in the majority opinion that the District Court's order precludes plaintiffs from attempting to prove that the Board, prior to the cut-off date, acted with a segregative intent or that its prior actions, inactions or policies violated the constitutional rights of minority pupils or their parents.

In my opinion, children who came into the Cincinnati School System after the cut-off date take the system as they find it, just like the other children who are attending the schools, and they are bound by our decisions in *Deal I* and *Deal II*.

APPENDIX E

MEMORANDUM AND SUBSIDIARY FINDINGS OF FACT**

(Filed September 30, 1968)

Following the entry of judgment herein after the sustaining of defendants' motion therefor at the close of plaintiffs' case, they perfected an appeal. The judgment thereafter entered in the Court of Appeals contained the following language:

> ". . . It is now here ordered and adjudged by this Court that the judgment of the . . . District Court in this cause be and the same is hereby affirmed on the issue of racial imbalance not intentionally caused by the Board, and the case is remanded for further findings on the issue of claimed discrimination in specific schools and programs and claimed harm to Negro students, allegedly caused by racially imbalanced schools, and for the taking of such additional relevant evidence as either party may offer." *

* Plaintiffs' motion for certiorari was denied October 9, 1967 (389 U.S. 847).

Following the remand, a chambers "conference to discuss the programming of the further proceedings" was held with all of counsel present. It will be recalled that the record in this matter consists of extensive stipulations, hundreds of pages of exhibits and all of the evidence presented by plaintiffs at the trial. Against that background, the chambers conference was opened by our asking counsel "[W]hat area of proof you would suggest is available which is not already contained in the record that exists in the District Court?" In response, counsel for plaintiffs

** Reported as an Appendix in *Deal, et al.* v. *Cincinnati Board of Education, et al.*, 419 F.2d 1387, 1398, 1401.

indicated their desire to supplement the record with evidence of "new school construction [which] has added to segregation in Cincinnati," and a reluctance "to begin the process of winding our way up to the Supreme Court and have a case get there on 1964 facts." We indicated doubt as to the admissibility of evidence of occurrences and developments subsequent to those alleged as creating plaintiffs' cause of action in this manner: "We certainly recognize that at the very least litigation in this day and age is recognized as a proper vehicle for social reform. That's really what we are talking about here. But the fact remains that this does continue to be litigation and for that reason I would assume that the vehicle has to be kept on tracks established by the general rules of litigation. Since that's true, how is it possible within the confines of a rather narrow and restrictive mandate to in effect try a new law suit?"

At the conclusion of a full discussion of that question, at the suggestion of the Court it was agreed that plaintiffs' counsel would attempt to get allegations or evidence of the intervening occurrences and developments into the record either by tendering a second amended complaint alleging them or by seeking pertinent information by discovery procedures. Counsel for both parties indicated satisfaction with this procedure since it offered whichever party might have been ultimately aggrieved by the ruling of the Court on the tendered amendment or objections to discovery an opportunity to record an exception to that ruling.

When at the end of a six months' period no attempt had been made to pursue either alternative, and it appearing probable that after further study plaintiffs' counsel had concluded that evidence of events subsequent to the accrual of the cause of action alleged would not be admissible, we advised counsel by letter that we "assumed that plaintiffs have abandoned their . . . indicated intention to supplement,

or to attempt to supplement, the record." Parenthetically, we offer the view that if there have indeed been intervening occurrences and developments constituting invasions of constitutional rights, they could appropriately form the basis of separate litigation, even though they may not properly be appended to the present action. Our letter further advised counsel "that any suggested findings of fact received from any of counsel" would be taken into account and considered in the preparation of the further findings and conclusions required by the mandate of the Court of Appeals.

Responsive to that invitation, and under agreement entered into by them, counsel for both parties simultaneously filed suggested findings of fact. Those documents have been meticulously prepared and have been of great assistance in the findings which hereinafter appear. However, our findings are much more restricted in scope because of the limited nature of the Court of Appeals' mandate. Our original opinion herein was by its terms "filed as the Court's findings and conclusions in compliance with Rule 52(a), Federal Rules of Civil Procedure," and it is not only not deemed necessary to reiterate the material set forth in that opinion, but it also would appear that such repetition would constitute only a burdensome excess. Accordingly, and in conformity with what we understand to be the direction of the Court of Appeals, this Court's findings of fact are those set forth in the original opinion and herein, read together.

Plaintiffs urge that a group of Supreme Court cases have substantially modified the law since the date of the Court of Appeals' decision herein. The cases cited in this context are *Green* v. *County School Board of New Kent County, Virginia*, 391 U. S. 430, *Rancy* [sic] v. *Board of Education, Gould School District*, 391 U. S. 443 and *Monroe* v. *Board of Commissioners of the City of Jackson,*

Tennessee, 391 U. S. 450, all of which were decided May 27, 1968. However, none of these cases is applicable because each involved a review by the Supreme Court of desegregation plans in school districts that had formerly operated under de jure segregation. So-called "freedom of choice" plans had been adopted in each instance, and it was held that they did not comply with the desegregation requirement of *Brown* v. *Board of Education*, 349 U. S. 294 (1955). In his opinion in the present case, Chief Judge Weick observed, "At the outset it should be pointed out that the State of Ohio abolished segregation in the public schools on February 22, 1887, which was more than 67 years before the Supreme Court barred it on constitutional grounds in the momentous decision of *Brown* v. *Board of Education*, 347 U. S. 483, 74 Sup. Ct. 686, 98 Law Ed. 873 (1954)." The record herein clearly supports our earlier determination that while segregation in the Cincinnati public educational system was practiced between 1849 and 1887, since that date Negroes have attended neighborhood schools on the same basis as white children living in the same locality. The group of cases cited above dealt with situations in which the imbalance between white and Negro children was caused by an act of discrimination on the part of the school authorities, and accordingly present an entirely different situation than that here under consideration.

Speaking for the Court of Appeals in the present case, Chief Judge Weick anticipated the line to be drawn between such cases as the group cited by plaintiffs in which a new plan was being put in effect and those like the one before us where a neighborhood school plan had long been followed in this language (369 F. 2d 63): "Further, it is clear that the duty of a school board in first imposing a neighborhood districting system where none was used before, is different from that where the system has been used for many years and the imbalance in the schools is the

result of population mobility among the various neighborhoods. In *Dowell* [*Dowell* v. *School Board of Oklahoma Public Schools*, 244 F. Supp. 971 (W.D. Okla. 1965)] the Court noted that the relative immobility of the Negro residents was used by the school board in separating them through the neighborhood policy, while in Cincinnati one of the primary causes of imbalance has been the rapid movement of the Negro population into different areas of the city."

Plaintiffs complain that at the trial of the present action evidence of racial discrimination in the public and private housing market was improperly excluded. The Court of Appeals made the following observation in this regard (369 F. 2d 60, Note 4):

> "The District Court correctly excluded evidence of alleged discrimination in the public and private housing markets. Such discrimination is caused, if in fact it does exist, by persons who are not parties to this case and the Board [of Education] has no power to rectify that situation. If appellants have any valid claim for infringement of their rights by public housing or urban renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to discriminatory practices, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission or in the state courts, if relief is denied, under the provisions of the Ohio Fair Housing Law. Ohio Rev. Code § 4112.01-07."

Plaintiffs now present the interesting argument that this determination of the Sixth Circuit Court of Appeals "should no longer be controlling" on this Sixth Circuit District Court, but that we should instead follow an opinion of the Fourth Circuit (*Brewer* v. *School Board of the City of Norfolk, Virginia*, 397 F.2d 37 (4th Cir. 1967)).

As is indicated in the quotation from its judgment set forth at the opening of this Memorandum, the Court of Appeals agreed that racial imbalance in the Cincinnati schools had not been shown by plaintiffs to have been intentionally caused by the Board of Education and affirmed our conclusion on that issue. In connection with what the Court of Appeals determined to be a deficiency in our original opinion the reviewing court pointed out that while plaintiffs offered expert evidence on the subject of the harm resulting to a Negro from the impairment of his capacity to learn because of his school's racial imbalance, but that since its motion to dismiss at the close of plaintiffs' evidence was granted, the School Board offered no opposing expert testimony. The Court of Appeals went on to observe, "No findings were made on these disputed issues. Without findings we are unable to determine whether discrimination existed with respect to specific schools and programs." The opinion then states the purpose of the remand in the language incorporated in the judgment above quoted.

Both in their original brief and in their proposed findings plaintiffs marshal many facts and figures from the record pertaining to the various schools in the Cincinnati system. They indicate the percentage of white and Negro students and teachers in different schools, the percentage of substitute teachers in the predominately white and Negro schools respectively, the comparative use of temporary classrooms in such schools, their comparative staffing by teachers with and without regular contracts and with and without masters degrees, and claimed differences in facilities in the different schools. An attempt is then made to correlate these and similar factors with pupil achievement and to thereby establish cause and effect.

To establish this relationship plaintiffs relied primarily on two expert witnesses. One of them had never even been in a school in the Cincinnati system; needless to say he had

never taught in or been associated with the Cincinnati schools, and he had never lived in the city. The second expert witness possessed no greater familiarity with the Cincinnati situation. Both testified of obvious necessity in broad, general terms. In at least one important area, the second witness admitted that he was "puzzled" because an established factual situation in a Cincinnati school was inconsistent with his conclusion. Even in the case of the physical sciences, acceptance of a witness's qualifications for the purpose of permitting him to express an opinion as an expert does not require the trier of the facts to accept an opinion so expressed, and in an area as nebulous as we have here entered there is at best no greater compulsion to accept an expert's opinion. We decline to do so, and as is indicated by the sustaining of defendants' motion for judgment at the close of plaintiffs' case, such evidence was not considered of sufficient weight to require rebuttal.

In partial response to the inquiry of the remand, it is found and determined that neither gerrymandering nor any other alleged discriminatory practice on the part of the Board brought about such racial imbalance as existed, and that plaintiffs' expert testimony is found not to have been of such relevance, weight and probative value as to make an issue calling for rebuttal proof by defendants. Further response to the inquiry of the mandate is submitted in the Findings which follow:

SUBSIDIARY FINDINGS OF FACT

1. From 1849 to 1887, separate educational facilities for Negro and white children were required by law. Thereafter the Cincinnati Board of Education (hereinafter the "Board") established nondistricted schools for Negro children attended by them on a voluntary basis. No such schools have existed in the Cincinnati system since 1955 when the last such school was districted. Except for such

voluntary attendance in such districted schools, since 1887 Negroes have attended neighborhood schools on the same basis as white children.

2. The Cincinnati schools operate under a neighborhood school plan which divides them into elementary, junior high and senior high schools. The senior high school attendance zone is made up of the attendance zones of the nearby junior high schools, which in turn derive their student population from the nearby elementary schools. The topographical characteristics of Cincinnati combined with its manmade barriers in the form of railroads, public thoroughfares and more recently expressways compel the following of irregular lines and patterns in composing the various districts, and the determination of those lines is made by the Superintendent. A further factor in his determination is the avoidance where possible of predominately Negro schools to the extent that the Board has any control over the causes which create such predominance.

3. Virtually every possible proportionate combination of white and Negro children exists in some school in the Cincinnati system. Carson school is 100% white while Dyer is all Negro. Hartwell School is 4.55% Negro, Hyde Park School has 14.61% Negro pupils, Clifton School is 20.99% Negro, Guilford School has Negro attendance to the extent of 39.06%, and so forth. The proportions are not constant. During a relatively short period of time in which there were no substantial changes in school attendance zone lines twelve Cincinnati schools changed to a heavy concentration of Negro pupils.

4. The only exceptions to the neighborhood school plan are found in connection with Walnut Hills Junior and Senior High Schools, which provide a special college preparatory program open to students recommended by their elementary principals, Central High School, which provides special technical training, and special programs arranged

to meet the needs of physically handicapped, deaf and blind students, and slow learning students. In 1964-65, 17.05 percentage of the Walnut Hills Senior High School was Negro, and of Walnut Hills Junior, 28.36%. During that year the percentage of Negroes in Central was 35.62.

5. There is not substantial evidence in the record to support plaintiffs' claim that attendance school boundary lines have been gerrymandered to exclude Negroes from certain schools. There is a high correlation of the distribution of Negroes throughout the school system to the general neighborhood residential patterns. Many areas which were formerly predominately white then had schools attended predominately by white pupils, now are predominately Negro and the schools therein are similarly now predominately Negro.

6. The area served by Lincoln Elementary School was assigned to Withrow Junior High School rather than to Eastern Hills Junior High School on the basis of geographical and fiscal considerations, and there is no evidence to support the contention that the determination was a gerrymandering to exclude Negroes.

7. The controversial change in the attendance zone boundary line between the Evanston Elementary School and the Hyde Park Elementary School in 1956-57 temporarily increased the number of Negroes in the predominately white Hyde Park School, but was without lasting effect on the racial composition of the Evanston School. The change was made to correct a condition of overcrowding at Evanston and to take advantage of available vacant space at Hyde Park.

8. The opening of Ach Junior High School in September, 1950, precipitated changes in attendance areas of Withrow Junior and Woodward Junior High Schools. These resulted from routine administrative decisions rather than any racial consideration. The evidence establishes that pupil

assignments were based on school building capacities and the requirements of increasing numbers of children.

9. Schools throughout the Cincinnati Public School System are overcrowded. The Division of Research, Statistics and Information of the Cincinnati Public Schools aided by the Bureau of Educational Research and Service of the Ohio State University prepared a report, "Survey of School Plant Needs, Cincinnati Public Schools." When this case came to trial school construction recommended in this report was either recently completed, under construction, or soon to be commenced. The evidence shows no relationship between the racial composition of a neighborhood involved and the decision of whether or not a new school building would be built there.

10. The survey of school plant needs called for four junior high schools (in Madisonville, Mt. Washington, Mt. Lookout and Walnut Hills-Evanston) in the Withrow High School district. While junior high schools were in construction or contemplation in these areas a large population shift occurred involving a large influx (predominately Negro) into Walnut Hills and Evanston. This gave rise to contentions that attendance zone boundary lines were determined on a basis of race, but the evidence establishes that such was not the case and that the determination of the lines constituted a reasonable exercise of discretion by the Superintendent.

11. Aiken High School was opened in September, 1962 in an area known as College Hill. The topographical characteristics of that area are even more extreme than in other Cincinnati areas and the establishment of zone attendance boundary lines is accordingly even more difficult, and further complications were created by an unanticipated enlargement of the student population. The decisions made by the Superintendent with regard both to Aiken and to schools having correlated problems were on the basis of his

professional judgment as to the most appropriate way to provide school accommodations, and were not made on the basis of race. No significant change in the racial composition of the schools resulted from these administrative decisions.

12. Madisonville is a Cincinnati neighborhood composed of both Negro and white residents. In September, 1964, Bramble Elementary School was opened to serve the southeastern portion of the Madisonville attendance zone. Then and immediately thereafter boundary line changes were made and consideration of the Madisonville-Bramble school attendance zone lines prompted the adoption by the Board of the statement of policy of March 9, 1964, set forth in full in our original opinion (244 F. Supp. 581). The determination of these zone boundary lines constituted a reasonable exercise of the Superintendent's administrative discretion and was not based on an attempt to gerrymander lines in order to artificially separate races. On the contrary, the determination was intended to result in maximum interracial experiences among the children.

13. At the beginning of the 1963-64 school year a transfer of pupils was necessary in order to relieve overcrowding of the Evanston School building, predominately populated by Negro students. In accordance with established policy, these temporary transfers, which were accomplished by the use of buses, were of classes which then occupied rooms in the Oakley School, predominately otherwise occupied by white students. As is indicated by the charts prepared in connection with these various transfers which were received in evidence, difficult and complicated administrative problems were presented. Transportation of pupils a substantial distance from their homes in a predominately Negro neighborhood to a predominately white neighborhood was necessary. The determination both of the need for the transfer and the means of accomplishing

it was a reasonable exercise of discretion by the Superintendent. It was not undertaken for the purpose of separating races, and in fact placed them in greater proximity with one another.

14. An emergency situation developed in the Millvale area during the 1956-57 school year which persisted through the next two years. This resulted in large part because of the opening of a new Metropolitan Housing Authority housing project the occupancy of which resulted in an overtaxing of the Garfield and Washington Elementary Schools that normally served the neighborhood. The Authority had announced that this would be an integrated housing project, but only Negro families moved in. Rather than move small groups of students from school to school each year as various classrooms became available the Superintendent decided to transport all of the pupils as a group to the Douglas School, it being the only one which could accommodate such pupils throughout the entire period of emergency. The course chosen was more economical, was more efficient administratively and avoided the probability of having children of the same family in different schools at the same time. The charts and graphs received in evidence showing the number of students involved, the schools in which space was available and the geographical relationship of the various schools demonstrate the complexity of the problem. The solution adopted by the Superintendent constituted a reasonable exercise of his discretion, pursuant to his power and duties under the law of Ohio. This exercise of discretion did not constitute an unlawful abuse thereof and was not undertaken for the purpose of artificial separation of races.

15. Defendants have consistently withstood efforts to assign children to schools on the basis of race, and successfully defended (on the basis of the neighborhood school policy) litigation instituted by white parents who did not

want their children to attend schools with Negro children. Applications for transfer from one school to another to avoid attendance with schools [sic] of another race have been denied.

16. There is no inequality of educational facilities based upon racial classification of students in the Cincinnati Public Schools.

17. Evidence containing detailed test data for all of the Cincinnati schools arranged in accordance with the percentage of Negroes in each school does not establish any relationship between racial composition of the school and pupil achievement. For example, five schools had exactly the same median grade equivalent on the Stanford Immediate Achievement Test and had the following percentage of Negro pupils: 0, 8, 15, 99 and 100.

18. Plaintiffs' two expert witnesses (professors from Antioch College, Yellow Springs, Ohio, and Washington University, St. Louis, Missouri, respectively) agreed that any deleterious effects that may have been attributed to a racially imbalanced school could, with equal probability, have been caused by preschool age family influences, neighborhood social environment, the family's economic status, and other socio economic forces concededly beyond the control of defendants. Neither witness could explain why one 100% Caucasian school was being over-achieved by each predominately Negro school in the Cincinnati system in a way that was consistent with their primary assertions. Plaintiffs' expert testimony is not of such relevance, weight or probative value as to make an issue calling for rebuttal by the defendants.

/s/ JOHN W. PECK
District Judge Sitting by Designation

APPENDIX F

No. 75-1244

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONA BRONSON, ET AL.,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, ET AL.,

Defendants-Appellees.

ORDER

Filed April 28, 1975

Before PHILLIPS, Chief Judge, and WEICK and LIVELY, Circuit Judges.

It is ORDERED that the parties file supplemental briefs on the following question:

> Should the doctrine of res judicata be held inapplicable in this school desegregation case on grounds of overriding public policy?

Simultaneous briefs on this issue shall be filed within twenty days from the date of the entry of this order. The briefs may be typewritten, with the original and three additional legible copies filed, reproduced by Xerox or similar process. Carbon copies may not be filed.

Entered by order of the court.

/s/ JOHN P. HEHMAN
Clerk

Supreme Court, U. S.
FILED
MAR 11 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1023

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, et al,

Petitioners,

MARTIN W. ESSEX, et al.,

Petitioners,

—vs—

MONA BRONSON, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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3B J. Moore's Federal Practice §23.10-1 at 23-2769; §23.11(3) at 23-2851 5

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals entered September 24, 1975 is not yet reported. The opinion of the Court of Appeals which granted permission to appeal from an interlocutory order is reported at 512 F.2d 718 (6th Cir. 1975). A petition for rehearing was denied on October 30, 1975. The opinion of the District Court is also unreported. All opinions are reproduced (at Appendix pages 1, 34 and 36 respectively) in the Appendix to the Petition filed by the Board of Education of the City School District of the City of Cincinnati.

JURISDICTION

The opinion of the Court of Appeals was entered

September 24, 1975. A Petition for Rehearing filed by the Cincinnati defendants was denied on October 30, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Whether despite the existence of prior litigation against the Cincinnati Board Petitioners, the court below correctly applied the applicable law in such a way as to permit the development of a full evidentiary record at the time of trial.

STATEMENT OF THE CASE

This action was instituted by private plaintiff on May 25, 1974. It alleged on behalf of children in the Cincinnati Public Schools and their parents a present condition of racial segregation in the public schools in violation of the Fourteenth Amendment. The defendants included the local Board and Superintendent as well as the State Board of Education, State Superintendent and other State defendants. Separate, related Petitions for Certiorari have been filed on behalf of the "local" and "state" defendants. This response is in reply to both Petitions.

In the answer filed in the District Court both sets of defendants raised an affirmative defense to the action for certain periods of time under the doctrine of *res judicata*. Plaintiffs, Respondents herein, filed a Motion to Determine the Affirmative Defense. The District Court found that the defendants could properly assert "the collateral estoppel aspect of that general doctrine." (A. 4) However, the District Court certified the question under 28 U.S.C. §1292(b). The Court of Appeals granted the appeal, initially stating:

> The effect of this ruling appears to be that plaintiffs would be collaterally estopped from relitigating any of the issues determined in the prior litigation between the plaintiffs in the earlier class action and the defendant board *and from introducing evidence as to events occuring prior to July 26, 1965.* 512 F. 2d at 719 (emphasis added) (A. 11)

Following extensive briefs, oral arguments, and subsequent supplemental briefs, the Court of Appeals affirmed the order of the district court as modified and interpreted. The court quoted its earlier order and pointed out that it would be unable to affirm the order of the district court if their original understanding at the time of the acceptance of the appeal had turned out to be in fact correct. The Sixth Circuit was able to affirm because "upon restudy of the order and memorandum opinion we conclude that it does not preclude the introduction of evidence concerning events which occured prior to July 26, 1965 (A. 11)[1].

The Cincinnati Petitioners attempt to characterize this as a suit between the Board and the NAACP (Brief of Cincinnati Petitioners p. 6) to avoid the reality that this case involves parents and children presently constituents of the public education system of the State of Ohio and the City of Cincinnati who allege a present condition of unconstitutional segregation in the Cincinnati Public Schools.

The variety of projections of dire consequences suggested to this Court by both petitioners, notwithstanding, the entire opinion of the Court of Appeals demon-

[1]Both courts concluded that factual inquiry in *Deal* vs. *Cincinnati Board of Education*, 244 F.Supp. 572 (S.D. Ohio 1965) ended with the facts presented "up to July 26, 1965". (A. 5; 56).

strates its adherence to the doctrine of collateral estoppel and its application of the rule of "issue preclusion". (A. 10) The decision permits the district court to try the case on a full evidentiary record. The lower court is given discretion in the admission of evidence and consideration thereof in order to insure that all of the facts are developed to assist the lower court in "determining whether the present [segregated pupil enrollments] of the Cincinnati school system is a result of constitutional violations on the part of the defendants." (A. 13) The decision permits district court to consider, as to children presently in the system, facts not presented in *Deal* occuring prior to July 26, 1965 as well as post 1965 actions, inactions and policies of the defendants which have caused or contributed to the conditions of which plaintiffs complain (A. 10, 11). The decision calls upon the district court to make evidentiary determinations at the trial and permits it to consider historical and present facts as part of its duty as the trier of the facts to determine whether there is an observable pattern, or cumulative evidence of possible constitutional violations. The evidentiary ruling of the district court will, after the trial on the merits, be subject to review by the Court of Appeals in the context of the proof and the purposes for which it has been offered rather then in a partial vacuum. The court will thereby avoid piecemeal review. See: *Control Data Corporation* vs. *International Business Machines*, 421 F. 2d 323, 327 (8th Cir. 1970); cited with approval in *Pollock and Riley, Inc.* vs. *Pearl Brewing Company*, 498 F. 2d 1240, *rehearing denied*, 504 F. 2d 760, *cert. denied* 95 S.Ct. 1427 (1975).

ARGUMENT

Petitioners each have suggested that the Court of Appeals has somehow abandoned the doctrines of *res judicata* or *collateral estoppel* and applied a different rule of law to school desegregation cases. An examination of the Court's opinion discloses its great respect and concern for each of these principles. The Court of Appeals noted that both *collateral estoppel* and *res judicata* are not rigidly applied. "Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice" *Tipler* vs. *E. I. DuPont DeNemours and Company*, 443 F. 2d 125, 128 (1971). (A. 9) The Court went on to note that the appeal required that it determine the extent to which the doctrine of *res judicata* should be applied in order to accommodate two competing public policies and avoid manifest injustice. It concluded that the district court was correct when it properly limited the application of the doctrine to this case by holding that the principle of *collateral estoppel* as opposed to *res judicata* should be observed. (A. 37) The Court went on to note that the original *Deal* case had been filed as a "spurious class action" under Rule 23 of the Federal Rules of Civil Procedure prior to the 1966 Amendment to the Rules. Under the old rule an adverse judgment in such an action was not binding on persons who were not parties to the class action. See 3B J. Moore's Federal Practice §23.10-1 at 23-2769; §23.11(3) at 23-2851. (A. 9)

The Sixth Circuit balanced the issue by applying the rule of "issue preclusion." See *Humphreys* vs. *Tann*, 487 F. 2d 666 (6th Cir. 1973), *cert. denied* U.S. 956 (1974); *Davis* vs. *McKennon and Mooney*, 266 F. 2d 870 (6th Cir. 1959); *Bernard* vs. *Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (1942). (A. 10)

The plaintiff children in this case were either not born in 1965 or had not yet started to school. Their claims were not in existence at the time of the judg-

ment in *Deal* and could not have been extinguished by it. *Lawlor* vs. *National Screen Service Corporation*, 349 U.S. 322, 328 (1955). The complaint of such children and their parents of alleged continuing acts subsequent to 1965 declares a different cause of action than that concluded by *Deal*, one to which estoppel does not apply. *Cream Top Creamery* vs. *Dean Milk Co.*, 383 F. 2d 358, 363 (6th Cir. 1967); *United States* vs. *General Electric Company*, 358 F.Supp. 731, 740 (S.D.N.Y. 1973). (A. 10-11) The Court held that these plaintiffs, in order to establish their claim of a present denial of constitutional rights, must be permitted to show whether the post 1965 actions, inactions, and policies of the defendants have caused or contributed to the condition of which they complain. This evidence cannot be considered in a vacuum. (A. 11)

The Court of Appeals has properly left to the district court the determination of the admissibility of evidence. The District Court itself refrained from attempting to catalog or describe in advance evidence which will be admitted at the time of trial. With respect to new evidence of pre-*Deal* occurrences or conditions, if offered, the district court is to determine in each instance whether or not such evidence is relevant to the inquiry in the present case. (A. 12) As the Court of Appeals and the District Court noted, the ultimate decision in the present case will necessarily require the consideration of cumulative evidence. In establishing that cumulative evidence both parties will be able to utilize the facts and the findings of the Court in *Deal*. (A. 11-12)

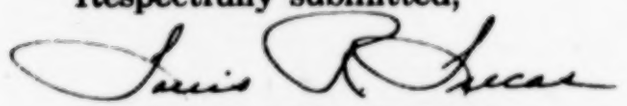
The path charted for the lower court by the Court of Appeals is not unclear. The district court is properly left with the traditional role of the finder of the facts. Its evidentiary determinations will be made in

the light of the reality of the evidence actually presented and the arguments advanced at that time and not in a vacuum. The opinion of the Court of Appeals directs the District Court to make a full evidentiary record and consider all of the relevant facts tending to illuminate the issue of whether or not there exists at the present time in the Cincinnati School district unconstitutional public school segregation. The decision of the Court is a narrow one, applicable to the facts of this case and subject to the full review process of the federal judicial system.

CONCLUSION

For the foregoing reasons the Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,



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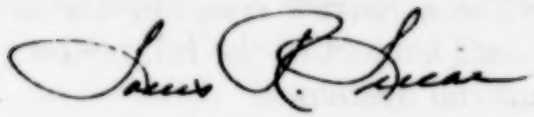
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Respondents' Brief In Opposition To Petitions For Writs of Certiorari has been served on all counsel of record by United States mail, postage prepaid on this 11th day of March, 1976.



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